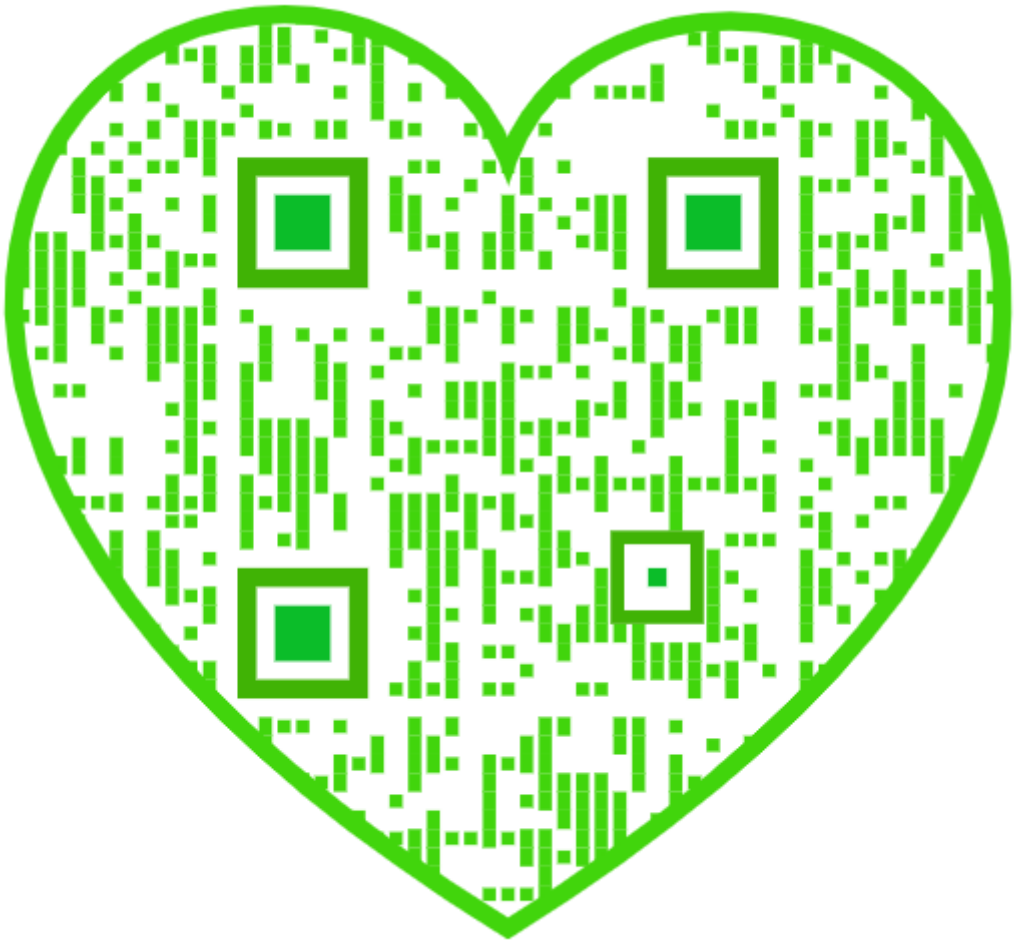

MORAL LAW

AND

CIVIL LAW

PARTS OF THE SAME THING

By ELI F. RITTER

NEW YORK: EATON & MAINS.
CINCINNATI: CURTS & JENNINGS.

Phil 8892.30

HARVARD COLLEGE
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PREFACE.

ABOUT twenty years ago, in an important trial in the city of Indianapolis, it was sought to break down the very strong testimony of a witness by showing that the general moral character of the witness was bad. It was not an attack upon the general reputation of the witness for truthfulness and veracity, but the inquiry was directed to the general moral character of the witness. About the same time, in another case in the same court, upon the application of a man to be admitted to the bar, a question was raised upon his moral character. A few weeks later, in another case, in another court, in the same courthouse, upon an application of a man for a license to sell intoxicating liquors, an issue was made upon his moral character. In each of these cases witnesses testified on

each side of the question. In each witnesses who testified to the good moral character of an individual on cross-examination specified truthfulness, honesty, and some other elements of morality which were characteristic of the individual, but admitted defects in some of the moral elements of good character, while witnesses who testified to the bad moral character on cross-examination specified defects in the moral character of the individual and immorality in certain regards in support of a general statement of bad moral character. And another case was a suit on a promissory note in which a defense was successfully made that the note was given for an immoral and hence illegal consideration. I was, at the time when these cases were tried, a young practitioner at the bar. I was very deeply impressed in each case by the apparent uncertainty in the minds of witnesses as to what is meant in the law by moral character and morality; not only the uncertainty in the minds of witnesses in these regards,

but also the manifest uncertainty in the minds of attorneys and judges in the same regard. On account of these exhibitions of uncertainty I became greatly confused in my own mind upon this subject. Lawyers and judges in each of these cases undertook to explain to witnesses what was meant by moral character and morality, and in doing so made it very clear that they had no more definite ideas upon the subject than the witnesses had. From my experience in the practice of law and other business and social relations since the trial of the cases to which I have referred, having seen the same questions often arise in the trial of cases in court, I have become satisfied that the general public has no definite idea, neither is there generally a clear understanding among lawyers and judges, as to the meaning of "morality," "moral character," and "immorality" in legal contemplation. Truthfulness, or business honesty, or generosity, in fact, every other term that is used in speaking of the characteristics of individuals, seems to be quite well

understood. Judges, lawyers, witnesses, and the public generally can deal with these terms with confidence in their understanding, but when the question of legal morality is raised the minds of all at once become clouded. The question as to what is meant by the terms "morality," or "moral character," or "immorality," is generally settled upon an assumed moral standard in a particular locality or the peculiar views of each individual. The impression seems to largely prevail that this question may be settled by adding up the good qualities in one column, the bad in another, and striking a balance. This is a very dangerous process. I have known men of many most excellent qualities, but in one respect almost, or quite, totally depraved. Their good qualities were used to give them greater influence in the line of their depravity.

There seems to be a fair degree of certainty in the public mind generally as to the meaning of Christianity or Christian morality. The great uncertainty in the

meaning of these terms arises when they are used in legal contemplation. As morality and moral character are terms in very prominent and constant use in judicial proceedings, they must have some definite meaning, and there must be some way of determining definitely what they do mean. The purpose of this book is to aid in settling these questions. I claim no new discovery in the meaning of terms, and what I should appreciate as the highest compliment that could be paid to this work would be to have it proved that what is claimed by the author for the legal contemplation of morality has been a settled question for a great many years.

If I can succeed in calling attention to, and aid in the correction of errors in the comprehension and application of, this term, and aid in arousing sentiment in support of morality in the fundamental position it occupies in civil affairs, I shall have accomplished my purpose and feel gratified. I have not undertaken to give exhaustive consideration to the subjects considered,

but to present and support them in the briefest possible way that I could do, putting the reader upon a line of investigation which can be pursued to great extent and profit.

ELI F. RITTER.

Indianapolis, February 4, 1896.

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MORAL LAW AND CIVIL LAW

PARTS OF THE SAME THING.

CHAPTER I.

LAW OF PUBLIC NECESSITY.

THERE is a law now in full force in every State in this Union, in the government of the United States, and in every government in the world, that was hoary with the frosts of centuries when Moses bared his feet in the presence of the burning bush, and that has ever since been the fundamental law in every government of the world. If you were to ask me for the book and page where this great law, with its full scope and specific provisions, might be found, I should not, neither would any other lawyer, be able to give them to you. I refer to the law of public necessity. This is not only an important law, but it is the supreme law of every government and every land. This law was defined and given its position in the Roman government before the begin-

ning of the Christian era in the following maxim, "*Salus Populi Suprema Lex*," which is translated to-day into the English language by the expression, "The Public Welfare is the Supreme Law." While I may not be able to give you the scope and specific provisions of this law, I may aid the reader in gaining fuller comprehension of the same by a few illustrations.

When the city of Chicago was on fire in 1871 and had been for nearly two days, and the city government had become exhausted in its efforts to repress the flames and had acknowledged its defeat, and the State of Illinois stood paralyzed in the presence of the fire king, General Sheridan was placed in command, and became substantially the only governing force for the time being in that locality. General Sheridan was the man to meet the demands of an emergency. He did not stop to ask the lawyer of Chicago what he could do, nor the business men what was expected of him. He proceeded to do what the necessity of the occasion required. He placed powder in the basements of a row of buildings two squares long, and at a given signal blew up and utterly destroyed the buildings, with their contents.

Those buildings and their contents were private property. Individuals held the title. The owners were not asked to consent, and their objections were unheeded. Their property was destroyed, and there was no provision of law by which any compensation could be recovered. This action was authorized and justified by the law of public necessity.

A few years ago a railroad train, loaded with passengers, leaving a Southern city, was stopped in a rural locality, run on to a switch, and compelled to stand still for two weeks without allowing any passenger to leave. This interference with the rights of the passengers, and their imprisonment, was justified under a public necessity to prevent the spread of yellow fever.

A few years ago officers of the law went to the residence of a prominent citizen of Philadelphia, and informed him that they were ordered to convey his wife to the pest-house because she was afflicted with small-pox. He did not consent, claiming that he had made ample provision for her care and the prevention of any public hazard on account of her disease. Regardless of his resistance, his wife was taken out of bed by

force, and carried away to the pest hospital. The husband followed the ambulance to the door of the hospital and asked to be admitted, that he might be with his wife in her sickness, but he was refused. That man's wife died—he never knew when—and was buried—he never knew where. If there is any right among men more sacred than all others, it is the right to be with and care for members of our own families in time of sickness, to stand by them in the hour of death, and to bury them in a place selected by us for that purpose, where the last resting place may be marked and visited. Yet that most sacred of all rights has not a feather's weight when it comes in conflict with the law of public necessity.

In 1863 the government of the United States needed men for military duty. A draft was ordered in Indiana to meet the emergency, and to add to the thousands of her sons who were already in the field as volunteers. Among those who were drafted was a poor man in southern Indiana. When notified, he said: "Surely the government will not make me leave my feeble wife and three little children and go into the army. I have no way of providing for them while

I am gone, and I have no money to hire a substitute." However touching such an appeal might be, it could not be regarded. He was compelled to leave that family mainly to the care of neighbors, was forced into the army and on to the field of battle. At night, after the first day of that bloody battle of Chickamauga, among the dead bodies brought together was found the mangled and lifeless body of the poor conscript. As his comrades looked into the glassy eyes and pallid face, and thought of the poor, sick wife and little children in their helpless condition, they said, "It was a hard thing that the government required of this poor man." But when the government has battles to fight, neither inconvenience, personal hazard, nor the needs of a family can excuse any man from its call to arms.

A citizen of Indianapolis a few years ago, who possessed all the privileges and rights that any other citizen in the city possessed, was suddenly arrested, tried, convicted, condemned, and on a day fixed for that purpose was compelled to ascend a scaffold, a rope was adjusted about his neck, his hands and feet were tied, the platform on which he stood was sprung, and he was strangled to

death. While the lifeless body of that man hung suspended between the heavens and the earth, an opportunity was offered to philosophize on the rights of an individual. An execution was issued upon the judgment rendered in his case, for costs, and every dollar's worth of property he had in the world was sold, and the proceeds applied to pay the expenses of the judicial proceedings that ended with the taking of his life. He had been deprived of all his rights of property, liberty, the pursuit of happiness, and life itself. All this because he had violated a law of public necessity, made in the interest and for the protection of society. It is true this proceeding was under a statute, yet such a proceeding would have been lawful if there had been no statute, being authorized by the common law of every government, and existed in the day when Haman was hanged by order of Ahasuerus.

The officers of the law may enter my house, and analyze the water in my well, and say to me that the water has in it the germs of disease, and that I must not use it —neither myself nor my family—nor permit anyone else to use it. I may answer: "This is my property; I had that well dug; we

have used that water for twelve years. I like it, and this is a free country." Nevertheless, if I disregard the injunction, I may be arrested, fined, and imprisoned, and that well—that poison fountain—filled to the brim to prevent the spread of disease, and I may be compelled to pay the expenses of all these proceedings. They may examine the milk in the pantry, and destroy it because it is unhealthful. All this is under the law of public necessity, to prevent the spread of disease. There will be no conflict upon the proposition, that anyone with his whole family may be absolutely restrained from using food, milk, or drinking water that is unhealthful. When the question is settled that a food or a fluid is unhealthful the law of public necessity asserts that it shall not be used. It would not be difficult to find illustrations of this principle in every State and in every government. The law of public necessity is only limited by the necessity itself. Whatever the public necessity requires to be done can be legally done anywhere. It is not conceivable that there should be a public necessity and no law to meet it, and the public be thereby left helpless. It can be readily

seen that no individual can assert a personal right against the law of public necessity. *There is no such thing, and never was, as an absolute individual right to do any particular thing, or to eat or drink any particular thing, or to enjoy the associations and bliss of one's own family, or to live, in conflict with the law of public necessity.*

The law of public necessity demands that everything which it requires to be done shall be done. It also, with the same authority, commands that everything which it requires not to be done shall not be done. I present another phase of this law by illustrations. Secs. 4569 and 4570, revised statutes of the United States, applying to every vessel that flies the flag and claims the protection of this government, read as follows: Sec. 4569. "Every vessel belonging to a citizen of the United States, bound from a port in the United States to any foreign port, or being of the burden of seventy-five tons or upward, and bound from a port on the Atlantic to a port on the Pacific, or *vice versâ*, shall be provided with a chest of medicines; and every sailing vessel bound on a voyage across the Atlantic or Pacific Ocean, or around Cape Horn, or the Cape of Good

Hope, or engaged in the whale or other fisheries, or in sealing, shall be provided with, and cause to be kept, a sufficient quantity of lime or lemon juice, and also sugar and vinegar, and other antiscorbutics, to be served out to every seaman as follows: The master of every such vessel will serve the lime or lemon juice, and sugar and vinegar, to the crew within ten days after the salt provisions mainly have been served out to the crew, and as long afterward as such consumption of salt provisions continues; the lime or lemon juice and sugar daily at the rate of half an ounce each per day; and the vinegar weekly at the rate of half a pint per week for each member of the crew."

Sec. 4570. "If on any such vessel, such medicines, medical stores, lime or lemon juice, or other articles, sugar and vinegar, as are required by the preceding section, are not provided and kept on board as required, the master or owner shall be liable to a penalty of not more than five hundred dollars; and if the master of any such vessel neglects to serve out the lime or lemon juice, and sugar and vinegar, in the case and manner directed, he shall for each such offense be liable to a penalty of not

more than one hundred dollars; and if any master is convicted for either of the offenses mentioned in this section, and it appears that the offense is owing to the default of the owner, such master may recover the amount of such penalty, and the costs incurred by him, from the owner."

It will be readily seen that these sections require that the supplies therein named shall be provided, and issued, and used.

This law has been enforced, and convictions and penalties adjudged under it, in a number of cases. About three years ago the captain of a vessel was brought before the United States Court in San Francisco, charged with failing to issue lime juice, of which he had a supply, upon a voyage just ended. He answered, admitting the charge, but saying that the men had asked for an extra ration of coffee instead of lime juice, and as he saw no necessity for the lime juice, he yielded to the wishes of the men. The court held that the officer was not made the judge of the necessity for issuing the lime juice; the law was peremptory, and it must be obeyed; and the officer was fined. However, as he had acted from good intention, his fine was merely nominal.

The legal question has been settled in this country, that any government, having jurisdiction, may require children or adults to submit to vaccination in order to prevent the spread of smallpox.

If the government of the United States, for the protection of the community on a great steamer that numbers its crew by the hundreds and its passengers by the thousands, or the little whaler that has a few persons on board, may require that lime juice, onions, or other specific shall be provided and used to meet the needs of, and to protect, such community on the high seas, and a government may require vaccination for like purpose on the land, then the United States government, or any other government, may make the same, or any, provisions and requirements for such communities on the land as public necessity may require in any case. Upon these illustrations I present the proposition, *that there is no individual right to refuse to eat, or to drink, or to do any particular thing, or all things, that the public necessity may require.*

We citizens may as well get ourselves in readiness to abstain from eating food, drinking water or milk, *or any other fluid*, or from

doing any and every thing that may be condemned by public necessity; and also hold ourselves in readiness to drink lime juice, eat onions, or any other specific, or do anything that may be required of us by the law of public necessity.

In Town of Lake View *vs.* Rose Hill Cemetery Co., the Supreme Court of Illinois defined the police power to be: "The law of overruling necessity." 70 Ill., R. 191. This brief definition of police power is fully sustained by authority.

Some one may say that if these propositions of law are correct, then civil government, at best, is legalized tyranny. Let us not misapprehend the effect of these propositions; let us bear in mind that the government must seek to promote the public welfare. In so doing, hardships may sometimes come to the innocent, and of necessity transgressors must be treated as outlaws, and pursued with relentless justice, that civil government, public health, public peace, morality, and good order may be protected; that the weak may be sheltered from the oppressor; that good citizenship may be encouraged and bad citizenship suppressed.

In this chapter I have been endeavoring

to present the rigid rules and extreme requirements of the law of public necessity. I have done this to meet the prating on personal liberty and individual rights so common in the mouths of American citizens with foreign ideas, and of political demagogues for personal ends. It is remarkable and amazing that these classes of persons have had such influence as to secure large acquiescence in their claims, and such hesitancy in exposing their fallacies. It should be borne in mind that rules of law are founded on the same principle as the yardstick, the bushel measure, and scales. It may be a great restraint sometimes on personal liberty and individual rights to give thirty-six inches for a yard, full measure for a bushel, twelve or sixteen ounces for a pound, or to regard the golden rule as a citizen, but the requirement and the obligation cannot yield to accommodate the ignorance, whim, or vice of the individual. The observance of these things is the pleasure of the honest man and the good citizen. The intelligent and the patriotic man will not be misled by false statements as to facts, nor fallacious arguments, nor expect good results from the application of false principles.

CHAPTER II.

MORALITY IS A FUNDAMENTAL PRINCIPLE IN CIVIL GOVERNMENT.

I HAVE attempted to show in the former chapter that public necessity is law. If there were no necessity for law there would be no law. This is true both as to moral and civil law. The term, civil law, is used for convenience, intending thereby in this work to comprehend civil and criminal law under the same head. There is no place nor condition where moral law does not obtain, and there is no place nor condition where the duty is to civil law only. The greatest object and purpose of civil government under our civilization is to promote and enforce good morals in the transactions and relations of its citizens. In carrying out the necessities of government and working out the principles of public necessity, morality is made a fundamental principle. Upon this proposition I quote the constitutional provisions that have been adopted by many of the States of the United States.

In the Constitution of Indiana, 1851, Art. 8, Sec. 1, is as follows:

"Knowledge and learning generally diffused throughout a community being essential to the preservation of free government, it shall be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvements, and to provide by law for a general and uniform system of common schools, where tuition shall be without charge and equally open to all."

Arkansas. Art. 2, Sec. 25, Constitution 1874:

"Religion, morality, and knowledge being essential to good government, the General Assembly shall enact suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship."

California. Art. 9, Sec. 1, Constitution 1879:

"A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvements."

Connecticut. Art. 7, Sec. 1, Constitution 1818:

"It being the duty of all men to worship the Supreme Being, the great Creator and Preserver of the universe, and their right to render that worship in the mode most consistent with the dictates of their consciences, no person shall by law be compelled to join or support," etc.

North Dakota. Art. 8, Sec. 147, Constitution 1869:

"A high degree of intelligence, patriotism, integrity, and morality on the part of every voter in a government by the people being necessary in order to secure the continuance of that government and the prosperity and happiness of the people, the Legislative Assembly shall make provision for the establishment and maintenance of a system of public schools which shall be opened to all children of the State of North Dakota, and free from sectarian control."

Sec. 149: "In all schools instruction shall be given as far as practicable in those branches of knowledge that tend to impress upon the mind the vital importance of truthfulness, temperance, purity, public spirit, and respect for honest labor of every kind."

Delaware. Art. 1, Sec. 1, Constitution 1831:

"Although it is the duty of all men frequently to assemble together for the public worship of the Author of the universe, and piety and morality, on which the prosperity of communities depends, are thereby promoted, yet no man shall or ought to be compelled to attend any religious worship, to contribute against his own free will and consent."

Florida. Sec. 5, Declaration of Rights, Constitution 1885:

"The free exercise and enjoyment of religious professions and worship shall forever be allowed in this State, and no person shall be rendered incompetent as a witness on account of his religious opinions; but the liberty of conscience hereby secured shall not be so construed as to justify licentiousness or practices subversive of, or inconsistent with, the peace or moral safety of the State or society."

Kansas. Art. 6, Sec. 2, Constitution 1859:

"The Legislature shall encourage the promotion of intellectual, moral, scientific, and agricultural improvement, by establishing a uniform system of common schools, and

schools of a higher grade, embracing normal, preparatory, collegiate, and university departments."

Maryland. Art. 43, Declaration of Rights 1867:

"That the Legislature ought to encourage the diffusion of knowledge and virtue, the extension of a judicial system of general education, the promotion of literature, the arts, sciences, agriculture, commerce, and manufactures, and the general amelioration of the condition of the people.

Art. 30 provides that no person shall be molested on account of his religious profession, "unless under the color of religion he shall disturb the good order, peace, or safety of the State, or shall infringe the laws of morality."

Massachusetts. Art. 11 of the Amendments, Declaration of Rights:

"As the public worship of God and instruction in piety, religion, and morality promote the happiness and prosperity of a people and the security of a republican government, therefore the several religious societies of the commonwealth shall have the right to elect their pastors, contract with them for their support, raise money to erect

and repair houses for public worship," etc.

Art. 18, Declaration of Rights:

"A frequent recurrence to the fundamental principles of the Constitution, and a constant adherence to those of piety, justice, moderation, temperance, industry, and frugality, are absolutely necessary to preserve the advantages of liberty and to maintain a free government. The people ought, consequently, to have a particular attention to all those principles in the choice of their officers and representatives, and they have a right to require of their law givers and magistrates an exact and constant observance of them in the formation and execution of the laws necessary for the administration of the commonwealth."

Chap. 5 of the Constitution, Sec. 2:

"Wisdom and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties, and as these depend on spreading the opportunities and advantages of education in the various parts of the country and among the different orders of the people, it shall be the duty of the Legislatures and magistrates to cherish

the interests of literature and the sciences, . . . to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and frugality, honesty and punctuality in their dealings; sincerity, good humor, and all social affections and generous sentiments among the people."

Michigan. Art. 13, Sec. 11, Constitution 1850:

"The Legislature shall encourage the promotion of intellectual, scientific, and agricultural improvements. . . ."

Mississippi. Art. 8, Sec. 201, Constitution 1890:

"It shall be the duty of the Legislature to encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement, by establishing a uniform system of free public schools, by taxation or otherwise, for all children between the ages of five and twenty-one years, and as soon as practicable to establish schools of higher grade."

Missouri. Art. 11, Sec. 1, Constitution 1875:

"A general diffusion of knowledge and intelligence being essential to the preserva-

tion and the rights and liberties of the people, the General Assembly shall establish public schools."

Nebraska. Art. 1, Sec. 4, Constitution 1875:

"All persons have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences. No person shall be compelled to attend, erect," etc. "Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the Legislature to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction."

New Hampshire. Art. 6, Bill of Rights:

"As morality and piety rightly grounded on evangelical principles will give the best and greatest security to government, and will lay on the hearts of men the strongest obligations to due subjection, . . . the people of the State have a right to empower, and do hereby fully empower, the Legislature to authorize from time to time the several towns, parishes, bodies corporate, or religious societies within this State, to make

adequate provision for the support and maintenance of public Protestant teachers of piety, religion, and morality."

North Carolina. Art. 1, Sec. 29:

"A frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty."

Art. 9, Sec. 1:

"Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and means of education should forever be encouraged."

Ohio. Art. 1, Sec. 7, Constitution 1851:

". . . Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the General Assembly to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction."

Rhode Island. Art. 12, Sec. 1, Constitution 1842:

"The diffusion of knowledge, as well as of virtue, among the people being essential to the preservation of their rights and liberties, it shall be the duty of the General Assembly to promote public schools, and to

adopt all means which they may deem to be necessary and proper to secure to the people the advantages and opportunities of education."

Tennessee. Art. 11, Sec. 12, Constitution 1870:

"Knowledge, learning, and virtue being essential to the preservation of republican institutions, and the diffusion of the opportunities and advantages of education throughout the different portions of the State being highly conducive to the promotion of this end, it shall be the duty of the General Assembly, in all future periods of this government, to cherish literature and science. . . ."

Vermont. Chap. 1, Art. 3, 1793:

". . . Nevertheless, every sect or denomination of Christians ought to observe the Sabbath or Lord's Day, and keep up some sort of religious worship, which to them shall seem the most agreeable to the revealed will of God."

Virginia. Art. 1, Sec. 17, Bill of Rights:

"That no free government nor the blessing of liberty can be preserved to any people but by a firm adherence to justice, moderation, temperance, and virtue, and by

a frequent recurrence to fundamental principles."

Sec. 18:

"That religion, or the duty which we owe to our Creator, and the manner of discharging it can be directed only by reason and conviction, not by force or violence; and, therefore, all men are entitled to the free exercise of religion, according to the dictates of their consciences, and that it is the duty of all to practice Christian forbearance, love, and charity toward each other."

West Virginia. Art. 3, Sec. 20, Bill of Rights 1872:

"Free government and the blessings of liberty can be preserved to any people only by a firm adherence to justice, moderation, temperance, frugality, and virtue, and by a frequent recurrence to fundamental principles."

Art. 12, Sec. 12:

"The Legislature shall foster and encourage moral, intellectual, scientific, and agricultural improvement, . . ."

In the States where neither morality nor education are specifically referred to in their constitutional provisions, these matters are nevertheless recognized by legislative acts

and by decisions of their courts as fundamental. Kentucky has no constitutional specification as to morality, but morality is, nevertheless, in her fundamental law. I cite a case in Kentucky to this effect.

The Commonwealth *vs.* Douglas, recently decided by the Court of Appeals, and reported in 24th S. W. Reporter, 233, from which I quote:

"When we consider that honesty, morality, religion, and education are the main pillars of the State, and for the protection and promotion of which government was instituted among men, it at once strikes the mind that the government, through its agencies, cannot throw off these trust duties by selling, bartering, or giving them away. The preservation of the trust is essential to the happiness and welfare of the beneficiaries, which the trustees have no power to sell or give away. If it be conceded that the State can give, sell, and barter any one of them, it follows that it can thus surrender its control of all, and convert the State into dens of bawdy houses, gambling shops, and other places of vice and demoralization, provided the grantees paid for the privileges, and thus deprive the State of its power to

repeal the grants and all control of the subjects, as far as the grantees are concerned; and the trust duty of fostering and protecting the honesty, health, order, and good morals of the State would be cast to the winds, and vice and crime would triumph in their stead. Now, it seems to us that the essential principles of self-preservation forbid that the commonwealth should possess a power so revolting, because destructive of the main pillars of government. . . ."

The State of New York also has no specific provision in her Constitution upon the subject of morality, but in the case of Stanton *vs.* Allen, 5 Denio (New York Report), 434, the Court of Appeals in that State, said: ". . . Sound morality is the corner stone of the social edifice—whatever disturbs that is condemned under the fundamental rule." These citations will be sufficient upon this matter, as I think there will be no controversy upon this subject.

While Justinian the Great was Emperor of Rome, about A. D. 530, he called to his aid a number of men of the highest legal learning of his time, and undertook to compile and define the principles of law then recognized by his government. He did

more than all other men in the history of that great empire for the establishment of sound legal principles. In describing the work he undertook and accomplished, he says:

"When, therefore, by the assistance of the same eminent person, Tribonian, and that of other illustrious and learned men, we had compiled the fifty books, called Digests or Pandects, in which is collected the whole ancient law, we directed that these institutions should be divided into four books, which might serve as the first elements of the whole science of law.

"In these books a brief exposition is given of the ancient laws, and of those also which, overshadowed by disuse, have been again brought to light by our imperial authority.

"Those four books of institute thus compiled from all the institutes left us by the ancients, and chiefly from the commentaries of our Gaius, both from his institute and his journal, and also from many other commentaries, were presented to us by the three learned men we have above named. We read and examined them, and have accorded to them all the force of our constitutions.

"Receive, therefore, with eagerness, and

study with cheerful diligence, these, our laws, and show yourself persons of such learning that you may conceive the flattering hope of yourselves being able, when your course of legal study is completed, to govern our empire in the different portions that may be intrusted to your care."

Justinian's first definition is as follows: "Jurisprudence is the knowledge of things divine and human; the science of the just and the unjust."

In Paragraph 3, of Book I, he says: "The maxims of the law are these: to live honestly; to hurt no one; to give everyone his due."

His whole system of laws was founded upon these principles.

Blackstone, about one hundred and twenty-five years ago, undertook the great work, in imitation of Justinian, of compiling legal principles as recognized in the jurisprudence of England. In laying down the foundations of his work, using the terms "Law of Nature" and "Ethics" in the sense of moral law, he speaks as follows:

"This will of his Maker is called the law of nature. For as God, when he created matter and endued it with a principle of mobility, established certain rules for the

perpetual direction of that motion; so, when he created man and endued him with free will to conduct himself in all parts of life, he laid down certain immutable laws of human nature whereby that free will is in some degrees regulated and restrained, and gave him also the faculty of reason to discover the purport of those laws.

"Considering the Creator only as a being of infinite *power*, he was able, unquestionably, to have prescribed whatever laws he pleased to his creature, man, however unjust or severe. But, as he is also a being of infinite wisdom, he has laid down only such laws as were founded in those relations of justice that existed in the natures of things antecedent to any positive precept. These are the eternal, immutable laws of good and evil, to which the Creator himself in all his dispensations conforms; and which he has enabled human reason to discover, so far as they are necessary for the conduct of human actions. Such, among others, are these principles: that we should live honestly, should hurt nobody, and should render to everyone his due; to which three general precepts Justinian has reduced the whole doctrine of law.

"But if the discovery of these first principles of the law of nature depended only upon the due exertion of right reason, and could not otherwise be obtained than by a chain of metaphysical disquisitions, mankind would have wanted some inducement to have quickened their inquiries, and the greater part of the world would have rested content in mental indolence and ignorance, its inseparable companion. As, therefore, the Creator is a being, not only of infinite *power* and *wisdom*, but also of infinite *goodness*, he has been pleased so to contrive the constitution and frame of humanity that we should want no other prompter to inquire after and pursue the rule of right, but only our self-love, that universal principle of action; for he has so intimately connected, so inseparably interwoven, the laws of eternal justice with the happiness of each individual that the latter cannot be obtained but by observing the former; and if the former be punctually obeyed it cannot but induce the latter. In consequence of which mutual connection of justice and human felicity he has not perplexed the law of nature with a multitude of abstract rules and precepts, referring merely to the fitness or

unfitness of things, as some have vainly surmised; but has graciously reduced the rule of obedience to this one paternal precept, 'that man should pursue his own true and substantial happiness.' This is the foundation of what we call ethics (morality), or natural law. For the several articles into which it is branched in our system amount to no more than demonstrating that this or that action tends to man's real happiness, and, therefore, very justly concluding that the performance of it is a part of the law of nature; or, on the other hand, that this or that action is destructive of man's real happiness, and, therefore, that the law of nature forbids it."

"This law of nature, being coeval with mankind and dictated by God himself, is, of course, superior in obligation to any other. It is binding over all the globe, in all countries, and at all times. No human laws are of any validity if contrary to this; and such of them as are valid derive all their force and all their authority, mediately or immediately, from this original."

Chancellor Kent, the distinguished American commentator and law writer, begins his commentaries with the following statement:

"When the United States ceased to be a part of the British empire, and assumed the character of an independent nation, they became subject to that system of rules which reason, morality, and custom has established among the civilized nations of Europe. . . .

"We ought not, therefore, to separate the science of public law from that of ethics or morality, nor encourage the dangerous suggestion that governments are not so strictly bound by the obligations of truth, justice, and humanity in relation to other powers as they are in the management of their own local concerns. States, or bodies politic, are to be considered as moral persons having a public will, capable and free to do right and wrong, inasmuch as they are collections of individuals, each of whom carried with him into the service of the community the same binding law of morality and religion which ought to control his conduct in private life. The law of nations is a complex system composed of various ingredients. It consists of general principles of right and justice, equally suitable to the government of individuals in a state of natural equality and to the relation

and conduct of nations; of a collection of usages, customs, and opinions the growth of civilization and commerce; and of a code of conventional or positive law. In the absence of these latter regulations the intercourse and conduct of nations are to be governed by principles fairly to be deduced from the rights and duties of nations and the nature of moral obligations; and we have the authority of lawyers of antiquity, and of some of the first masters in the modern schools of public law, for placing the moral obligation of nations and of individuals on similar grounds, and for considering individual and national morality as parts of one and the same science."

Sheldon Amos, M.A., Professor of Jurisprudence in the University College, London, Tutor to the Inner Temple of Jurisprudence, Civil Law, and International Law, in a work published in 1872, entitled *Systematic View of the Science of Jurisprudence*, Vol. I, page 515, says:

"The purpose of the law is to fortify and to maintain public morality, and not to create and invent it; give solidity and permanence to the essential relationship on which national life depends, and not to be

the formation of their vital energy; to secure for every man and woman for the creation of rights and duties a clear and open space for unrestricted action, within which they are free to develop all their faculties without hindrance or intrusion from without; and to uphold the security of such institutions as the voluntary efforts of mankind may devise or adopt, as seems to them best calculated to quicken or develop or invigorate the moral aspirations of the race."

Dr. Francis Lieber was educated and received high cultivation in the schools of France. Among other works was his *Manual of Political Ethics* (morality), which he wrote and published in 1878. Chancellor Kent says, in approval of this work: "Dr. Francis Lieber, in his *Manual of Political Ethics*, has shown with great force, and by the most striking and apposite illustrations, the original connections between right and morality, and the reason and the necessity for the application of the principles of ethics (morality) to the sciences of politics and administration of government. The work is excellent in its doctrines, and it is enriched with various and profound erudition."

Bishop, for thirty years recognized in the United States as a standard authority on criminal law, in his work on that subject says, Sec. 495: "Morality, religion, and education are the three main pillars of the State and the substance of all private good. A community from which they are banished represents more than the gloom of original chaos. Therefore, they should be objects of primary regard by the law."

Also, Sec. 500: "But however uncertain may be the precise extent to which the common law protects Christianity, there is no question that it practically and fully cherishes the public morals. And it punishes as a crime every act which it deems sufficiently evil and direct, tending to impair the public morals."

The same author, in his works on contracts, enlarged edition, Sec. 505, says: "Prominent among the interests which the law protects are the public morals."

The legal authorities here cited upon this proposition are taken from the various periods of history reaching back to the beginning of the Christian era, and also universally recognized as the leading authorities upon law and jurisprudence. I might add

a large number and quote volumes to the same effect, but for the purposes of this work must content myself with the support thus given to the proposition that morality is a fundamental principle of civil government. I hazard nothing by saying that no legal authority of respectable standing can be found to the contrary.

CHAPTER III.

WHAT IS MORALITY?

I KNOW nothing about which there exists in the public mind or the legal profession more uncertainty than there is concerning the word "morality," in civil law. There are very few attorneys, whatever may be the length of their experience or their standing in the profession, who would answer without hesitation or with confidence the question, What does the law mean by the word morality? It is most remarkable that a word so familiar, as old as the language, which is a translation of Latin and Greek terms, extending beyond the Christian era, a word which is used for the foundation stone of civil government, should convey so vague and uncertain an idea to the public mind. This familiar word evidently has some meaning, represents some great and indispensable principle, is of the greatest importance, or else it would not have been so long in use and been given such remarkable prominence

in civil affairs. There is a very large and influential school of political teachers who insist that morality, whatever it means, should not be connected in any way with politics or legislation, asserting that men cannot be made moral by legislation. On the other hand there is a very large and influential school that teaches that morality and religion are the same thing, who believe in the union of Church and State, and that politics and legislation should provide for and control matters of religion. It will not be controverted that civil governments must contemplate, as do these United States, the protection of liberty in religious belief, and encourage religious worship as they do education and other subjects for the purpose of good influences that come from these things. These civil governments, however, cannot define and favor, or control, or restrict, any special form of religious worship or belief. I am convinced that there is a general and prevailing uncertainty among the masses of people as to the distinction between matters of religion and morality. Out of this uncertainty comes a very dangerous sentiment creating the impression that as civil government cannot enforce mat-

ters of religion and forms of religious worship, it cannot enforce matters of morality and moral conduct.

Let me attempt to simplify from a legal standpoint the difference between religion and morality. Religion refers to the inner individual life and belief. Religion requires that a man should love his neighbor as himself, but the civil law cannot compel him to do so, nor punish him if he does not. Morality requires a man to treat his neighbor honestly and fairly, and can compel him to do so, and punish him if he does not. Religion is a matter of belief; morality is a matter of conduct. The law does not interfere with matters of belief, but does undertake to control matters of conduct. The legal distinction between religion and morality is thus clearly presented without further discussion, so that no man need go astray. The words virtue, utility, ethics, and especially the latter, have been largely considered and made subjects of many books, and have occupied the time and attention of great minds. In recent years the word "altruism" has been suggestive as a theme for great attention and the expression of beautiful ideas. The science of sociology is just

now attracting wide attention and consideration. There seems to be a general timidity and hesitation in the use of the word morality and the consideration of its scope and application. Upon careful consideration of all that has been written and said, and is being written and said, about this word and many words of like import, it will be seen that what is, in the main, contemplated and discussed under each and all of these names is the simple, common, old-fashioned subject of morality, nothing more, but often something less. Why hunt for terms or words, why confuse counsel, why attempt to weaken the force of the good old word morality, by using vague, uncertain, feebler terms, that have never had, and never can have, a fixed and settled meaning? I come to plead for a fixed science, and no vagary.

Paley, in his work on *Moral and Political Philosophy*, written more than one hundred and ten years ago, begins with the first sentence as follows: "Moral philosophy, morality, ethics, and natural law mean all the same thing; that science which teaches men their duty and the reason of it."

I have gone through many volumes written upon the subjects just referred to,

seeking for a concise definition of morality, or the definition of its synonyms. I find these writers admitting great difficulty in giving the definition. I find them analyzing the word, considering its component elements, and devoting much time to each of these, taking the word to pieces, and spending much time in defining, specifying, and explaining the nature and office of the pieces, and I must admit great disappointment in finding that they fail to put the pieces back together, and tell us what the structure is. They give the component parts, but not the composition. If morality is a foundation stone or a pillar in the construction of the State, we certainly can lay our hands upon that corner stone or upon that pillar. The more books that have appeared upon this subject, the greater the uncertainty in the public mind. If there is such a thing as morality, we must be able to know what it is. If it cannot be defined, it cannot be understood; if it has no standard, it is not practical; if it cannot be identified, it is a myth. Theologians confuse it with religion, and lose sight of it in its civil character. Philosophers and metaphysicians tear it to pieces and fatigue the life out of

it, and often leave it so disfigured that its best friends cannot recognize it. We common people of average intelligence want, and must have, some definition, concise, in plain English language, of this great subject that we can understand. We common people must have erected in our midst a standard to which we may look and live, while we and our families are being bitten by these fiery serpents that are everywhere in society. It seems to me in this great emergency we must look to the civil law for information and relief. In fact that is the source from which the information should and must come, when we seek the civil and legal standard of morality. Let it be borne in mind that morality is not religion. It has sometimes been said that men make their morality their religion, and expect to be saved by it. In such a case morality becomes religion to the individual, and in it and by it he performs his acts of worship of some supreme being. Whether he can be saved thereby is no part of the subject I am now considering. Morality is for this life only. Morality is purely a civil condition; refers to the citizen, to the individual in his relations to other people and society.

I propound the hard question, if it is so understood, for the purpose of answering the same, without evasion or equivocation —What is meant in Law by the word "Morality?"

In the case of Lyon *vs.* Mitchell, 36th N. Y., 235, the Court of Appeals, in a decision of a question properly before it, said: "The defendant, I think, has no right to ask a charge that (as asked in the lower court) any contract which conflicts with the morals of the time is void, as being against public policy. To make such a contract thus void it must be against sound morals, as defined by Paley to be 'that science which teaches men their duty, and the reason of it' (Paley *Moral Philosophy*, B. 1, C. 1). 'Morality is the rule which teaches us to live soberly and honestly. It hath four chief virtues—justice, prudence, temperance, and fortitude.'

"To make a contract void on the principle claimed, it must be against morality as thus defined. The morals of the time may be vicious; public sentiment may be depraved; the people may have gone astray so that not one good man can be found. Sound morals, as taught by the wise men of

antiquity, as confirmed by the precepts of the Gospel, and as explained by Paley and Horne, are unchanged. They are the same yesterday and to-day."

This decision has been cited with approval in New York a number of times and in subsequent decisions, and has never been criticised or rejected by the Supreme Court of any State, so far as I have been able to find.

In the *American and English Encyclopedia of Law*, Vol. XV, page 716, this definition of morality is quoted in the text as settled law, and this case is cited.

In the case of Baltimore and Potomac Railway Co. *vs.* The 5th Baptist Church, 108 U. S. Supreme Court Report, page 739, among other things in applying the rules of law in that case, the court said:

"Whatever the extent of the authority conferred, it was accompanied with this implied qualification, that the works should not be so placed as by their use to unreasonably interfere with and disturb the peaceful and comfortable enjoyment of others in their property. Grants of privileges or powers to corporate bodies like these in question confer no license to use

them in disregard of the private rights of others, and with immunity for their invasion. The great principle of the common law, which is equally the teaching of Christian morality, to so use one's property as not to injure others, forbids any other application or use of the rights and powers conferred."

The point distinctly presented in the decision last cited in the quotation I make from it, to which I call attention, is the declaration of the highest judicial tribunal in this land, that common law morality and Christian morality are the same.

In Leiber on Penal Law, 2nd Lieber's *Miscellaneous Works*, 471, the author says: "At common law, indictability and immorality are convertible terms."

In Wharton's *Criminal Law*, Vol. I, sec. 140, the author quotes the foregoing expression from Leiber, and modifies slightly the claim of Leiber by saying, "There are some immoral acts which are not indictable, and some indictable acts which are not immoral;" but he says: "If we were required to supply a further test, we might say that public policy demands the indictability of all immoral acts of which punishment by law is the proper retribution."

In Wells's *Pollock on Torts*, American Edition, 1894, page 12, the author gives as the subject of a paragraph, "Relation of the Law of Torts to the semiethical precept, 'Alterum non laedere' ('Thou shalt do no harm to thy neighbor')."

Discussing this subject, he says: "We have then three main divisions of the law of torts. In one of them, which may be said to have a quasi criminal character, there is a very strong ethical, moral element. In another no such element is apparent. In the third such an element is present, though less, and manifestly so. Can we find any category of human duties that will approximately cover them all, and bring them into relation with any single principle? Let us turn to one of the best known sentences in the introductory chapter of the Institutes copied from a lost work of Ulpian: 'Juris percepta sunt haec; honeste vivere alterum non laedere, suum cuique tribuere'—'The maxims of the law are these: Thou shalt live honestly. Thou shalt do no hurt to thy neighbor. Thou shalt give everyone his due' ('Honeste vivere'). 'Thou shalt live honestly' is a vague phrase enough. It may mean refraining from criminal of-

fenses, or possibly good behavior in social and family relations ('suum cuique tribuere') 'Thou shalt give everyone his due' seems to fit pretty well with the law of property and contract. And what of 'alterum non laedere?' ('thou shalt do no hurt to thy neighbor.') Our law of torts, with all its irregularities, has for its main purpose nothing less than the development of this precept. This exhibits it, no doubt, as the technical working out of a moral idea by a positive law, rather than the systematic application of any distinctly legal conception. But all positive law must presuppose a moral standpoint, and at times more or less openly refer to it, and the more so in proportion as it has, or approaches to having, a penal character."

In *Law of Torts*, by Piggott, page 208, on the subject of frauds he says: "It will be noticed that we have ignored the distinction between legal and moral fraud sometimes drawn. 'I am of the opinion,' said Bromwell, L. J., in Weir *vs.* Bell (3 ex. D., 243), 'that to make a man liable for fraud, moral fraud must be proved against him. I do not understand legal fraud. To my mind, it has not more meaning than legal heat or

legal cold, legal light or legal shade. There never can be a well-founded complaint of legal fraud, or of anything else, except where some duty is shown, and correlative right and some violation of that duty and right. . . .' In truth we are discussing the legal aspect of a moral question, and, as we have seen, the common law does practically adopt the same standard as morality. The apparent exception to which 'legal fraud' is sometimes attached is the liability of the principal for the fraud of his agent; but this may be rested on another moral ground. His claim to take advantage of his agent's fraud is in itself a moral fraud."

Sheldon Amos, M.A., Professor of Jurisprudence in University of London, very high authority on any subject which he touches, from whom I have hereinbefore quoted, in a book entitled *A Systematic View of the Science of Jurisprudence*, on page 516 says:

"There exists somewhere a true and common canon, or standard of action, inflexible in itself, and yet withal admitting of an easy adjustment and the most exquisite modulations for all members of society,

which the more habitually each member adopts, the vaster is the expansion of which his own nature is capable, and the less is the chance of the need of interruption to others; and which the more habitually all men adopt, the more freely and harmoniously the general machinery of social intercourse works. This canon or standard of action is hard, indeed, to discover, and particular societies may spend long ages in unavailing efforts to discover it. . . . This canon or standard of action, including here under the term action all the thoughts and feelings that give it life and warmth, is absolute morality. It is only the visible image of the mechanical scaffolding of this that is designated by the phrase, 'National law.'"

When the law by its expansion and its nearer approach to the image of absolute morality becomes, as the author says, "a mode of benevolent guidance and aid," then, as he continues, it "characteristically stands forth as the ever present and incarnate witness of that ultimate morality of which it is, at best, no more than the symbol and the counterpart."

This distinguished author closes his work as follows:

"It is not then in law nor in government that hope must be placed for the direct culture of a nation's vitality. It is in moral and spiritual efforts, whether expressed in salutary and silent influences or in highly systemized organizations. . . . In a word, it is to these direct inspirers of human virtue and energy that law itself must turn in order to find at hand a race of citizens whose dearest concern will be to obey, to cherish, and to reform it."

There seems to be a general impression abroad that the word "morality" is a general term like the words "cattle" and "horses," and that it includes many different varieties. Under this false idea morality, as applied to the ministers of the Gospel, is one thing; to the teacher, another thing; to the attorney, another thing; to the business man, another thing; and to the applicant for license to sell intoxicating liquors, it is *anything* for his especial benefit. It is high time for earnest teaching to correct these errors in the public mind. Morality is like truth; it has no varieties. It is the same thing in every place and relation; whether it appears in the pulpit, in the business transaction, in the court of justice, in the home,

or in political affairs. It is one thing that cannot be adjusted to accommodate the necessities of any man or any business. In the language of the highest court in the State of New York, heretofore quoted, but which I repeat because of the great value there is in the expression, "Sound morals, as taught by the wise men of antiquity, as confirmed by the precepts of the Gospel, and as explained by Paley and Horne, are unchanged. They are the same yesterday and to-day."

Let it be fully understood that in legal contemplation, thoroughly settled, *Christian Morality*, *Statutory Morality*, *Constitutional Morality*, *Common Law Morality*, *Common Sense Morality*, and *Morality are all the same thing*. Whenever, wherever, and in whatever connection the word "morality" is used, it means *morality*. If ever used in any other sense, it is improperly used. Simplifying the legal standard, it may be easily understood that the law considers questions of morality as governed by the golden rule.

There is not any standard of religious creed. A man may profess any kind of religious belief that is not immoral and does not violate any civil law.

Mormonism was only unlawful so far as it

was immoral, and its immorality consisted in recognizing the plurality of wives.

There is a legal standard of morality up to which every man must come, and the standard is the same in every State. This is fixed and required, like standards of weights and measurements. The standards of weights and measurements might be changed, but the standard of morality cannot be. It has been settled and fixed as the work of all the learning, wisdom, and experience of the past, in fact, by a supernatural influence, and cannot be changed.

Civil government, applying this standard to business affairs, will compel full measurement, full weight, full count, and that the goods come up to the sample. This is absolutely necessary to promote and protect business affairs.

If civil government were to give its whole attention to the cultivation of the youth in high integrity in business affairs only, and the punishment of offenses against the rules of morality in this regard only, how long could it hold together? The *social* affairs of her citizens are of the most importance to the government, and are not to be neglected.

A young man from a farm not many

years ago presented himself to the president of the Indiana State University, and said he had determined to become a public speaker, and had come to study grammar. The president asked him what else he desired to study. He said, "Nothing else." The president said, "We cannot teach you grammar by itself. You must take other studies with it." The young man said, "Why, is not grammar in a book by itself?" The president said, "Did you ever try on the farm at home to fatten only one quarter of a beef at a time?" He answered, "No; you cannot fatten a beef at all, unless you fatten it all together." The president said, "So you must fit yourself all together if you expect to meet your ambition."

The government can only be safe when her citizens are developed and regulated by the moral standard as applied alike to business, educational, and social affairs. The leaders in strikes and mobs, who block and terrorize business, disregard morality in social affairs, and do not believe that morality exists in business affairs, are the products of false teachings on morality in civil affairs.

It is more important to the government

that a citizen should be moral than that he should be religious, but religion is the greatest teacher upon the subject of morality. This is the reason why the law encourages religion and religious worship.

It has been held in various States, especially in Pennsylvania by her Supreme Court, that the Christian religion is a part of the law of the land, and that the system of morality as represented and defined by the Christian religion is the standard of morality in this nation.

Paley combined, in one treatise, moral and political philosophy. He laid down the rigid rules of morality as they were in his day, and had been from time immemorial, and ever must be. Yet he has been charged by high authority with attempting to modify them a little to accommodate aristocratic influences.

When the word "morality" was used in the Constitution of Indiana in 1851, and made the first and most important subject upon which the Legislature is commanded to act, it must be presumed that it was so used in contemplation of its history and full meaning, not only as understood in 1851, but also as its fullness and meaning shall appear in 1951, and always.

It is my purpose to aid in correcting the impression that there are different kinds and standards of morality.

There is only one kind, and only one standard of morality, known to the civil law.

This is true in every State and by the laws of the United States.

Then, when we speak of moral law and civil law, we mean parts of the same thing.

Using commonplace terms, morality and moral character is each made of the following elements in equal parts:

1. Fair dealing in business and social life.
2. The exertion of a good influence in all relations; and,
3. Faithful obedience to the law.

Every man knows either one of these elements when he sees it, or hears it, or feels it. Every man, I mean every man who knows enough to exercise the privileges of citizenship in any form, in fact, knows full well what morality and moral character are in every other form except in legal contemplation. My purpose is to make clear and to emphasize the most important fact, that morality and moral character are exactly the same in legal contemplation as they are when viewed from any other established standpoint.

CHAPTER IV.

WHAT IS IMMORALITY?

IT may seem unnecessary to ask such a question. It may seem that this is a foolish question. However, my observation leads me to believe that there is a very great uncertainty in the public mind upon this subject, especially as to the legal comprehension of the word "immorality." Let it be kept in mind that I am considering every matter in this work from a legal standpoint only. I use Indiana as an illustration of what is true of every State in this government. I must depend upon illustrations from this State, because to follow the subject as it has run through all the States is unnecessary for the purpose of this work. The illustrations I shall use can be pursued by the citizens of any State, and would be found to apply as forcibly in any other State as in Indiana.

The Legislature in Indiana has passed laws defining offenses, every one of which any candid person will admit is, independent of

civil laws, an immoral act. These offenses, which are essentially wrong and immoral, are forbidden by law as a public necessity. For the purpose of showing the extent to which our Legislature has gone I quote the subjects of criminal statutes in our State:

Treason.
Misprision of Treason.
Murder in First Degree.
Murder by Duel in the State.
Murder by Duel Outside of the State.
Murder in Second Degree.
Manslaughter.
Assault and Battery with Intent.
Assault.
Assault and Battery.
Malicious Mayhem.
Simple Mayhem.
Robbery.
Kidnapping.
Child Stealing.
Rape.
Rape of Insane Women.
Poisoning with Intent to Kill.
Poisoning Springs, etc.
Prescribing Medicines when Drunk.
Prescribing Secret Medicine.
Attempting to Procure Miscarriage.
Women Soliciting Medicine for Miscarriage.
Libel.
Blackmailing.
Arson.
Burning Woods, Prairies, etc.
Burglary.
Housebreaking in Daytime to Steal.
Entering House, etc., to Commit Burglary.
Housebreaking to Commit Violence.
Petit Larceny.
Receiving Stolen Goods.
Secreting a Will.
Stealing Public Records.
Officer Stealing or Destroying Records.
Altering Records.
Carrying off Fruits, etc.
Trespass.
Embezzlement of Public Funds.
Embezzlement by Officers.
Embezzlement by Employees.

Embezzlement by Lawyers and Collectors.
Embezzlement by Railroad Employees.
Embezzlement by Innkeepers and Carriers.
Embezzlement by Bailee.
Embezzlement by Tenants.
Embezzlement by Treasurers.
Embezzlement of Public Funds.
Embezzlement of Fiduciaries.
Malicious Trespass.
Selling and Secreting State Arms.
Removing Mortgaged Goods.
Injuring Telegraph or Telephone Poles or Wires.
Running Hand Car without Authority.
Obstructing Railroad Track.
Injuring Vines and Trees.
Defacing Tombstones.
Injuring Trees on Highway.
Obstructing Highway.
Cutting Shade Trees.
Altering or Removing Landmarks.
Defacing Legal Advertisements.
Pasting Bills on Building.
Altering Marks.
Forcible Entry or Detainer.
Defacing Library Books.
Unauthorized Military Expedition.
Aiding Hostile Army.
Privateering.
Challenge to Duel.
Dueling.
Prize Fighting.
Affray.
Riot.
Rout.
Provocation.
Drawing Dangerous Weapon.
Carrying Dangerous Weapon.
Furnishing Deadly Weapon to Minor.
Disturbing Meetings.
Bigamy.
Incest.
Adultery and Fornication.
Seduction.
Enticing Females to House of Ill Fame.
Keeping House of Ill Fame.
Public Indecency.
Disposing of Obscene Literature.
Sending Obscene Literature.
Advertising Drugs for Female Use.
Profanity.

Sabbath Breaking.
Houses of Assignation.
Pimp.
Prostitution.
Letting Stallions in Public.
Sodomy.
Playing Baseball on Sunday.
Perjury.
Perjury in Voluntary Affidavit.
Subornation of Perjury.
Bribery of Public Officers.
Bribery of Jurors.
Compounding Felonies.
Compounding Misdemeanors.
Compounding Prosecution.
Concealing Criminals.
False Personation.
Producing False Heir.
Substituting Child.
Extortion.
Judge Practicing Law.
County Officer Practicing Law.
Holder of Office Acting as Notary.
Falsely Attesting Affidavit.
Falsely Attesting Acknowledgment.
Officer not Explaining Instrument.
Notary Acting after Office Expires.
Justice or Constable Purchasing Judgment.
Suffering Capital Criminal to Escape.
Suffering Felon to Escape.
Aiding Prisoner to Escape.
Aiding Convict to Escape.
Aiding Prisoner to Escape from Jail.
Suffering Person Charged with Misdemeanor to Escape.
Obstructing Writ of Habeas Corpus.
Obstructing any Legal Process.
Convict Escaping from State Prison.
Disobeying Subpœna for Citation.
Corruptly Influencing Jurors.
Suffering Jail to be Unclean.
Cruelty to Poor.
Official Negligence.
Refusing to Aid Officer.
Common Barrator.
Usurpation of Office.
Officer Acting without Qualifying.
Intoxicated Officer.
Keeping County Office in Improper Place.
Officers Discounting Orders.

Extortion from Pensioners.
Officer Interested in Public Contracts.
Township Trustee Refusing to Pay Just Demand.
Bribery of Officer.
Auditor of State Drawing Warrant Illegally.
State Officer not Accounting.
Obstructing Examination of State Treasury.
False Report as to Treasury of State.
State Treasurer Paying Illegally.
State Treasurer Using False Voucher.
Defalcation of State Treasurer.
Breaking Quorum in Common Council.
Breaking Quorum in General Assembly.
Neglect of Roads.
Recording Deed without Transfer.
Misfeasance of Clerk of Printing Bureau.
Misfeasance of Inspector of Grain.
Public Nuisance.
Creating Stagnant Water.
Nuisance by Dead Animals.
Selling Unwholesome Provisions.
Selling Diseased Animals.
Selling Unwholesome Milk.
Adulterating Native Wines.
Adulterating Liquors.
Making or Selling Poisonous Liquors.
Befouling Water.
Selling Oleomargarine.
Adulteration of Vinegar.
Selling Uninspected Meat.
Raffling.
Lotteries and Gift Enterprises.
Advertising Lotteries.
Betting and Pool Selling.
Keeping Gaming Houses.
Keeping Room for Pool Selling.
Inducing Minors to Gamble.
Gaming.
Bunco-steering.
Common Gambler.
Keeping Devices for Gambling.
Allowing Minors to Play at Gaming.
Selling Liquor to Drunken Man.
Selling Liquor to Habitual Drunkard.
Selling Liquor to Minor.
Misrepresenting Age to Obtain Liquor.
Furnishing Liquor to Prisoners.

Keeping Disorderly Liquor Shop.
Selling Liquor on Sunday.
Druggist Selling Liquor on Sunday.
Trading Near Camp Meeting.
Cruelty to Animals.
Suffering Glandered Horse at Large.
Allowing Diseased Sheep at Large.
Bringing in Texas Cattle.
Killing Deer.
Hunting Quails, Pheasants, or Wild Turkeys.
Taking Prairie Chickens.
Destroying Birds.
Destroying Woodcock or Wild Duck.
Hunting on Lands without Consent of Owner.
Injuring Property while Hunting.
Keeping Quail, etc., for Sale at Certain Times of the Year.
Carrying Game Killed in Violation of Law.
Selling Game not Shot.
Carrying Game beyond State.
Killing Wild Pigeons.
Spearing or Trapping Fish.
Stretching Net near Ohio River.
Poisoning Fish.
Using Seines, Dynamite, etc.
Selling Canada Thistle Seed.
Allowing Canada Thistle to Grow.
Suffering Growth of Canada Thistle.
Gathering Cranberries on Public Lands.
Overworking Children at Factories.
Preventing a Person from Working.
Impeding Railroad Travel.
Disclosing Contents of Telegram.
Disclosing Contents of Telephone Message.
Promoting Divorces.
False Labels of Weights.
Altering Inspector's Marks.
Bringing Pauper into State.
Deserting Wife or Child.
Vagrancy.
Tramps.
Amalgamation.
Counseling Amalgamation.
Swindling Underwriters.
Conspiracy.
Malicious Prosecution.
Failing to Keep Light on Drawbridge.
Obstructing Navigable Streams.
Maintaining Bridge without Draw.
Leaving Bridge Open.

Injuring Bridge.
Driving on Towpath.
Opening Canal Blocks.
Performing Marriage Ceremony without Authority.
Failing to Return Marriage.
Giving False List of Taxables.
Not Providing Fire Escape.
Obstructing Road.
Obstructing Drainage.
Obstructing or Diverting Water.
Not Providing Outswinging Doors.
Defrauding Creditors.
Appropriating Estrays.
Entry on State Lands.
Horse Racing on Highways.
Running Horses in Towns.
Charging Illegal Ferriage or Toll.
Oppressive Garnishment.
Transferring Claims for Garnishment.
Selling Notes of Insolvent Bank.
Disturbing Grave.
Taking Corpse.
Aiding Concealment of Corpse.
Buying Corpse.
Climbing on Cars in Motion.
Obstructing Highways with Cars.
Running Passenger Cars without Tools.
Engineer Failing to Stop at Railroad Crossing.
Deceiving Railroad Engineer.
Untimely Crossing on Railroad Track.
Stopping Train on Crossing.
Obstructing Highway with Train.
Locking Passenger Cars.
Failing to Give Signals.
Selling Dangerous Toys.
Selling Examination Questions.
Pointing Firearms.
Permitting Gambling on Grounds of Agricultural Society.
Running Traction Engine on Highway without Sending Man Ahead.
Giving or Selling Tobacco to Children.
Heavy Hauling on Highway at Certain Times.
Hunting Squirrels at Certain Times.
Voting Illegally.
Voting in Wrong Precinct.
Nonresident Voting.
Importing Votes.
Voting More than Once.
Hiring Men to Vote or Refrain.

Selling Votes.
Fraud of Election Officer.
Altering Returns.
Refusing to Receive Vote.
Officer Persuading Voter.
Officer Opening or Marking Ticket.
Deceiving Illiterate Voter.
Defrauding Voter.
Using Violence, Threats, or Restraints to Influence Voter.
Seizing Ballot Box.
Destroying Ballot Box or Ballots.
Inducing Voter to Resign Petition.
Selling Signature to Petition.
Fraud at Special Election.
Buying Vote.
Bribing to Secure Election.
Bribery for Nomination.
Short Weights.
Selling Coal by False Weights.
False Gas Meter.
False Pretense.
Presenting False Claim.
Forgery.
Signing Blank Certificate.
Counterfeiting Coin.
Uttering Counterfeit Coin.
Uttering Counterfeit Coin to Circulate.
Having Counterfeit Coin.
Having Counterfeit Apparatus.
Counterfeiting Labels.
Having Dies to Counterfeit Labels.
Selling Goods with Counterfeit Labels.
Wearing Badge of Military Order to Obtain Assistance.
Burning Natural Gas in Flambeaux.
Failure of Railroad Company to Provide Waiting Rooms.
Selling Merchandise to Employees at Higher Prices than to Others.
Wearing Badge of Secret Society when not Entitled to do so.
Failure to Provide Screens for Employees of Street Railways.
Marrying to Avoid Prosecution for Bastardy or Seduction.
Horse Racing at Certain Times.
Permitting Minor to Loiter about Saloon.
Running Saloon in Connection with other Business.
Having Devices for Amusement or Games in Saloon.

In all three hundred and twenty.

The foregoing statutes, it can be seen, are, in most cases, against classes of offenses in which many acts in each class are included, so that the number of acts forbidden is at least one hundred greater than the number I have given in the subjects named. Also add to the foregoing enumeration offenses defined by acts of Congress against revenue, postal laws, etc., which apply in every State. The Legislature might have passed a sweeping statute forbidding everything that in its purpose or effect is against sound morality. It will be seen that the Legislature has gone so far in its special definition of forbidden offenses as to legislate even in restraint of the temper and the tongue. The list of forbidden acts is growing, not only in the States of this Union, but with the advancing civilization of every government of the world. Profanity is immoral, and has been forbidden by statute wherever civilization has reached respectable growth. Profanity was unlawful at common law, and the only purpose accomplished by a statute upon this subject is to fix a penalty. It is often urged that statutes should not be enacted that

are in advance of public sentiment, and that if the law cannot be enforced so as to repress what it forbids it should be repealed, so as not to cause contempt for all law. Statutes against profanity are so frequently and so boldly disregarded that they stand almost as dead letters. No wise man, however, would favor the abrogation of these statutes and thereby remove the restraint from the brutal tongue. Profanity was condemned by the Ten Commandments more than three thousand years ago, and has been unlawful ever since by existing law under civilized conditions. It must not be overlooked that the commandments were only civil laws, intended solely for civil government. They were each in advance of public sentiment several thousand years at least, but are each yet maintained with no prospect of abrogation, as standards of human conduct required by civil law. Nations, governments, and innumerable people have been destroyed because of disobedience to the principles announced, but the commandments stand unchanged as the law. No man has a legal right to be immoral, or to do any immoral thing where any person can hear or see his act. He has

no legal right to associate with immoral persons or characters. The civil law can break open the door to the hiding place of immorality, disregard all rights of liberty and property, and drag the offender to the judgment seat. The recent notorious case of Oscar Wilde is a good illustration of the relentless pursuit of civil law after private sin and immorality and the crushing judgment against it.

The government demands in imperious terms private and public morality of its citizens, and undertakes to enforce its demands. It expends fabulous sums of money to educate and encourage the youth in the qualities of good citizenship. No stronger evidence could be adduced of the fixed and dominating influence of morality in government than the constitutional provisions, legislative acts, judicial decisions, and settled rules of law upon the subject.

CHAPTER V.

LEGISLATION AND MORALITY.

THE purpose of legislation is to provide for the emergencies of civil government. The limits to the power of legislation can be stated in a few words, without entering into refinements of constitutional provisions or legal learning. The Legislature can enact whatever the public necessity requires to be enacted in order to carry out the purpose of the government, which is the promotion of the public welfare, and it can do no more. As was clearly established in the second chapter of this work, morality is the fundamental principle in civil government. Therefore the Legislature can, by its action, do whatever tends to promote morality; but any act in antagonism to morality is void. Every act of the Legislature must be in harmony with morality.

Certain purposes must be in the mind of the Legislature in every act—either the encouragement and promotion of morality, intelligence, or business in the dealing,

associations, and deportment of men, or the suppression of immorality. It will be found, upon careful examination of the civil and penal statutes, that they seek to accomplish the same ends. They seek to regulate and provide for the business transactions among men, so as to avoid conflict, injustice, or oppression. It will also be found upon careful examination that many of the criminal statutes are intended to enforce and protect the provisions of legislation upon business affairs. It is a great question whether criminal statutes are not increasing more rapidly than civil statutes. In fact, if it were not for the criminal disposition in business transactions, there would be little necessity for business regulations by law. In every government in Europe, as well as in the United States, the necessity is recognized for greater restraint by law in the interests of society and business upon immorality. A concise expression upon this subject, which might be multiplied with many other extracts of similar import, I quote from the *Encyclopædia Britannica*, Vol. XI, page 18, what is said as to this line of legislation in England: "Coercion for moral purposes. The measures hereto-

fore noticed may in general be justified either on the ground of inability of the persons protected to help themselves, or on the ground that some good to society as a whole, or to a large portion of it, is secured thereby.

"Another class of measures openly aims at the moral importance of the individuals affected by them, and in this class there is an amazing and alarming increase. The laws against gaming are one of the best examples. At common law a wager was a contract enforcable by law. Not content with declining to enforce wagers, the State went further and tried to put them down altogether. It made lotteries illegal. It visited with heavy penalties the keeping of betting houses in public places, the publication of betting lists, etc. Games which lead to betting are put under the restraint of a license system, and in some parts of the provinces the State orders its citizens not to play billiards after eleven o'clock at night. . . . The State first of all limits the number of public houses; then it dictates directly the hours during which liquor may be bought and sold; and in Scotland and Ireland it goes further, and prohibits altogether the sale of liquor on

Sunday. A committee of the House of Lords has touched the highest point of government control in proposing to empower local authorities to shut up all the public houses in their districts and carry on the business for themselves. There is a simultaneous increasing tendency to interfere with people's amusements; fairs are being put down as immoral, music and dancing require license charily granted, the grip of the chamberlain over the London theaters is tightening, and so on.

"The course of moral legislation, in fact, threatens to sweep away every barrier to the encroachment of the State.

"The extended range of government interference in other things has been accompanied, as we have seen, with a very distinct recommendation of limits, either in the rights of the individual conscience or in the capacity of adult manhood to manage its own affairs. But acts of Parliament for improving the moral characteristics of men seem to recognize no limit at all. And it is a singular fact that while this kind of legislation under existing social arrangements fails to affect the well-to-do classes, and oppresses chiefly the comparatively poor, it is

becoming more and more identical with the popular party in politics, and gathers strength with every addition to the popular element in government."

The foregoing statement is a carefully prepared and unbiased article written and published more than fifteen years ago. Anyone who has observed the tendency in Germany, France, and Russia, or smaller governments in Europe, will find that what is said of this line of legislation in England is true of these governments, though not to the same extent, and the same is true in the United States and in various States in this Union. It will also be found upon careful examination that the purpose of this line of legislation is to promote morality and suppress immorality. We hear the statement made by small politicians and men who only seek the attainment of personal ends, that men cannot be made moral by legislation, that morality should be left to the Church and to religious teachers or to home training. It is amazing the extent to which this idea obtains, not only in politics and partisan expression, but among all classes of people. It is not only erroneous, betraying dense ignorance,

but is very dangerous. It is to this heresy we must attribute the treachery, scheming, and trickery of legislators, and sometimes of courts and executive offices. The facts are, morality has everything to do with legislation, everything to do with the executive and judicial departments, and everything to do with everything when civil government is in safe hands.

The great misfortune in legislation is that each legislative body feels that it is not governed by ancient, long-settled, and well-determined rules, that it is largely independent and unrestricted by precedents. Considering the ignorance so often found in legislative bodies, the utter lack of experience and the weakness of so many of the members, the skillful manipulators and light regard for consequences, it is not surprising that wise men have dreaded and feared the work of legislative bodies. Had it not been for the restraints against the wrong and the encouragement for the right that sound morality has thrown over these bodies, only disaster could have followed. There is no branch of the government, however, that offers greater encouragement to the student than the legislative,

notwithstanding the weakness, inexperience, ignorance, and corrupting influences and temptation. The history of this branch of government shows a constant rise in the scale of morality, whatever may sometimes appear to the contrary. It is constantly illustrated that one man of moral integrity and average intelligence in a legislative body is more than the equal of a score of immoral and depraved members.

Let it not be forgotten, let it be emphasized, repeated, emblazoned in the halls of every legislative body, that morality is a fundamental principle in legislation, and but for this principle, this law of nature, this law of God, this law of man, this good angel, popular government would fail. Morality cannot be disregarded by the Legislature; it must be regarded, or the action of the body is void. Moral law was not created by a legislative body. It was never enacted. It was not created by the Constitution of the State or of the nation. Neither the Constitution itself nor the Legislature can disregard it and the action be valid.

The Legislature may not bargain away the public morals permanently. It may not do so temporarily. It cannot bargain

away the public morals for one year, for one day, nor for one hour. Neither the Constitution nor the people themselves can do this. There is absolutely no power anywhere to bargain away or compromise public morality. No man can defeat and destroy it; it stands as a fundamental principle. What is meant by the police power of the State is the unlimited law of necessity, the authority in the Legislature and the judiciary and the executive to protect public morals, public health, public peace, and public welfare in all regards.

CHAPTER VI.

COMMON LAW AND MORALITY.

IN addition to statutory law we have in Indiana, for our government, the common law. Sec. 236, Revised Statutes of 1881, in Indiana, reads as follows:

"The law governing this State is declared to be . . ." Item 4. "The common law, and statutes of the British Parliament in aid thereof, prior to the reign of James I (except the second section of the sixth chapter of the forty-third year of Elizabeth and the ninth chapter of the thirty-seventh, Henry VIII), and which are of a general nature not local to that kingdom and not inconsistent with the first, second, and third specifications of this section."

Common law is defined as follows: "The common law is that which derives its force and authority from the universal consent and settled customs of the people. It has never received the sanction of the Legislature by express act, which is the criterion by which it is distinguished from the statute

law. It has never been reduced to writing.

"By this expression, however, it is not meant that all of these laws are at present merely oral, or communicated from former ages to the present solely by word of mouth, but that the evidence of our common law is contained in our books and depends on general practice and the judicial adjudications of our courts. The common law is derived from two sources, the common law of England and the practice and decisions in our own courts. There is no general rule to ascertain what part of the English common law is binding. . . . It may be observed generally that it is binding where it has not been superseded by the Constitution of the United States or of the several States, or by legislative enactments, or varied by custom, and where it is founded in reason and consonant to the common genius and manners of the people." No man can make a mark at the place or time where the rules of common law, or any one of them, were found; neither can he name the discoverer. However, as each of these rules has stood the test of ages and now prevails in Indiana and elsewhere, and is in perfect accord with

the Ten Commandments and the law of Moses in its general character, it is a blessed and easy thing for men who believe in the divine authorship of the Ten Commandments to believe that these same rulesof common law were of divine origin. This theory takes these rules back to a source of superhuman wisdom. The method of explaining rules and principles of law as now accepted by the most profound writers and authorities upon jurisprudence is the historic method; and this method of explanation traces the rules of common law to the source I have indicated. Any other theory as to the origin of these rules and principles of common law ends in mist and utter dissatisfaction. The Supreme Court of the United States, in the case of Baltimore and Potomac Railway Co. *vs.* 5th Baptist Church, etc., 108 U.S., 739, as a conclusion reached upon the somewhat lengthy consideration of the legal principles involved in the case, said, "The great principle of the common law which is equally the teaching of Christian morality," etc.; and the court proceeded in that case to make an application of this principle.

In this work I have not stated and shall not insist, because I deem it unnecessary to

the purpose in hand, that Christianity is part of the law of the land, though that may be claimed by a citation of the highest authority. I am presenting the subject of morality from a different standpoint—from a standpoint to be accepted by men of any or no religious belief. The decision of the United States Supreme Court just cited is important as declaring the law from the highest judicial tribunal in the land, giving the source of the moral standard. It is not an open question, subject to controversy or debate in either branch of the law, whether statutory or common law, that morality is the fundamental rule and principle by which the law is regulated.

CHAPTER VII.

MORALITY IN CIVIL COURT.

THE moral law, with its rules and standard established by the learning, experience, religious teaching, divine revelation, and judicial decisions of the past, is as binding upon the citizens as the civil law, because it is a part of the civil law. Every legislator, every governor, every judge, every lawyer, in entering upon the duties of his office, holds up his hands toward heaven and takes an oath to obey the constitution and to perform the duties of his position, so help him God. This appeal for help to God means something. It is not an empty form. Either it is blasphemy, in taking the name of God in vain, or is mockery, or is an idle performance, or it is the most solemn ceremony that can be performed. The person by whom this obligation is administered and the person to whom it is administered are dissembling and are playing the rôle of the arrant hypocrite, or else they are acting the part of the highest citizenship

and highest patriotism. It is very clear that Almighty God will not help the legislator, nor the governor, nor the judge, nor the attorney in any way to establish, or protect, or excuse any business, or transaction, or thing that is against morality. Even if the Legislature does attempt to give sanction and confer its authority upon any enterprise which is immoral in its nature or which results in immorality, then the governor and the judge have each an oath registered in heaven to declare such legislation void. The United States Supreme Court in the case of Mugler *vs.* Kansas, 123 U. S., 205, has defined the duty of the court in such a case as follows:

"The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty, indeed, are under a solemn duty, to look at the substance of things whenever they enter upon an inquiry whether the Legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, public morals, the public peace, or the public safety, has no real or substantial relation to these subjects, or is a palpable invasion of rights

secured by the fundamental law, it is the duty of the court to so declare, and thereby give effect to the Constitution."

Nothing has contributed to bring courts and the legal profession into disrepute, thereby encouraging mobs and white-cap proceedings, so much as the general impression that morality has not a place in judicial proceedings, either in fact or in theory. Within the past two years the town of Roby, Indiana, has become distinguished as a location of enterprises of stupendous character for gambling and depravity of all kinds. I have been greatly interested in the discussion through the public press and in the expressions quoted from attorneys which assert that these things have been authorized by an act of the Legislature, and therefore could not be prevented. It would be very difficult to ascertain just how such conclusion was reached. As an illustration, one would infer that it had been reached by turning the pages of our statutes looking for an enactment concerning Roby, Jackson, and Corbett. Finding no act upon either of these specifically, it was then declared that, as there was no act upon this subject, therefore James Corbett and Peter Jackson could proceed

with a prize fight at Roby without any restraint from the law. While opinions upon this basis were being freely given a Chinaman was arrested in the city of Indianapolis for the establishment and maintenance of an opium-smoking joint. He was brought before the court upon a criminal charge for that offense. The same class of attorneys and self-styled profound investigators of legal principles, figuratively speaking, turned the pages of the statutes of the State of Indiana and the ordinances of the city of Indianapolis looking for enactments in regard to Chinamen and opium-smoking joints. They found no such laws. They found no allusions to Chinamen or to opium-smoking joints in the statutes of the State or in the ordinances of the city; but the Chinaman was convicted, fined $500, and sent to the workhouse for six months. That case was clearly sustained by law, though not one word in regard to the offenses charged could be found in any law book, or statute, or city ordinance. The penalty, however, was too severe. The case was founded, and properly so, upon the immorality of the Chinaman's business and its bad affect upon the public health and public morals. No legis-

lative act could be passed that could authorize or protect such a business. Neither could any act be passed, however solemn its form, that would protect the exhibitions at Roby.

As no act of immorality can be lawful or protected by legislation, so no decision of a court can long stand that in any way favors, protects, or excuses immorality. No act of the Legislature that contemplates or results in promoting immorality can be valid.

The judicial is the most important branch of any government. I have called attention to the fact in a former chapter that legislative bodies were liable not to feel themselves bound by fixed and settled rules or precedents, and were liable to act upon the impression of their entire independence. This can never be the impression under which courts of justice act. Courts are bound by rules and principles that have been recognized and developed by the learning, experience, and integrity of thousands of years, and are stronger to-day in their binding force than they were when Columbus discovered America. The most salutary rules of law, or, properly speaking, the most salutary laws, were never enacted by any Legislature, but have been developed by

judicial decisions. These rules have been settled by the most profound learning and experience; have been thoroughly considered, tested, applied to emergencies, and are established. Courts, in the application of these rules, have differed sometimes, misapplied, overruled their own decisions, and readjusted their views to meet the requirements of these great principles.

We have often had occasion in Indiana, as has been the case in other States, to apply the rules of common law to questions where there has been no statutory provision, and these emergencies are likely to arise in all the future. There is one distinct, well-defined principle running through the civil law—the law of Rome—reaching beyond the Christian era, older than constitutions and republican forms of government, and maintained continuously down through all existing systems by judicial tribunals, that morality is to be conserved in all judicial actions. It is true that the comprehension of morality was sometimes vague, yet, as comprehended, it was regarded as fundamental. The time and attention of courts, in the United States especially, are very largely required in an effort to construe and apply well-settled rules

of law to crude and badly-considered legislative acts, considered and passed by legislative bodies composed of men who know little or nothing of legal principles. However ignorant or depraved the Legislature may be, courts are bound to accept its acts as the law, if they are harmonious with the Constitution, by using all presumptions in their favor that are consistent with fundamental principles.

The government expects and demands the exertion of each of its departments in one harmonious effort to promote the purposes for which it exists. The departments of government—executive, legislative, and judicial—can only act legally within the respective scope of each department. Each, however, has to do with the enactment of laws, so far as legislation is concerned. The judicial department, however, has not only the duty and responsibility of construing and declaring and settling the law as it is represented in legislative acts, but has also to apply these ancient principles of the common law in many cases, and, in addition thereto, the rules of what is generally termed "public policy;" in other words, "The law of public necessity." The rules

of public policy, or, what is the same thing, the law of public necessity, are limited only by the extent of the necessity. There is set up before each department of the government, however, a standard for its guidance. This standard is public morality. It must measure and weigh every act. It is the one standard, and the only one, that commands obedience in all respects.

In 1840 the Supreme Court of Indiana was composed of three judges, each of remarkable ability and high moral and religious character. Without disparagement to the reputation of any of the learned and good men who have occupied the Supreme Bench in our State, I can assert, without offense, that that high court has never been composed of men superior in all regards to Judges Isaac Blackford, Jeremiah Sullivan, and Charles Dewey.

In the case of Watts, et al. *vs.* Pratt, 5th Blackford, 337, Judge Dewey delivered the unanimous opinion of the court in concise and clear language, defining the rule of law governing courts in such cases, in the following language: "The subject of this law is to protect the public morals and preserve the peace and quiet of society; being

designed for the public good, it should be so construed as to promote it."

I quote again in this place what I have previously quoted from the Supreme Court of the United States, because, this being the highest tribunal in the nation, its decision must be taken as the settled law, and I need not support the proposition further by the citation of many cases, as I would otherwise feel compelled to do. The court defines the duties of courts as follows:

"The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty, indeed, are under a solemn duty, to look at the substance of things whenever they enter upon an inquiry whether the Legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, the public peace, or the public safety, has no real or substantial relation to these subjects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the court to so declare, and thereby give effect to the Constitution."

What is designated in law as public policy is a matter of such uncertainty, and about

which there is so little general information, that I feel called upon to offer some explanations of this term, because it is the duty of the courts to determine what is public policy, and where it applies. In *American and English Encyclopedia of Law*, Vol. IX, page 880, under the heading "Public Policy Explained," the following explanation is given:

"This term is equivalent to the policy of the law. It is applicable to the spirit as well as to the letter. Whatever tends to injustice or oppression, restraint of liberty, commerce, and natural or legal rights, whatever tends to the obstruction of justice or to the violation of the statute, and whatever is against good morals when made the object of a contract, is against public policy, and therefore void, and not capable of enforcement. A form of contract may be legal on its face. There may be parties, competent, willing, and agreed upon the subject-matter, who enter into an agreement to do or not to do, with an apparently fair consideration stipulated, but their agreement is null and futile if its object is judicially immoral or against the policy of law. . . . In construing contracts, courts hold entirely void those that are partly illegal in their

object. Legal stipulations are treated as unwritten when interwoven with others designed to controvene the law, or tending to that end. An illegal consideration will not be analyzed or dissected so as to separate good simples from bad, when the compound is noxious, rendering the object of the contract unlawful."

Bishop, on *Contracts*, sec. 467, speaking of the rule of law as applied by courts, says:

"Contracts, illegal or of evil tendency, immoral or contrary to the policy of the law, or to public policy; agreements between parties to do a thing prohibited by law, or subversive of public interest, which the law cherishes; forbidden either by the common or the statutory law, whether it is malum in se, or merely malum prohibitum, indictable or only subject to the penalty of forfeiture; or however otherwise prohibited by statute or the common law," are void.

Courts look at the result from the execution of contracts, and if they result in immorality they are void, though they may seem to be harmless. In the case of Riley *vs.* Gordon, 122 Mass., 231, the court says:

"A contract may be illegal, though fair on its face."

No gambling contract or contract having an immoral consideration or contract to compel the performance of an immoral act, nor the payment of money for an immoral act performed, can be enforced in court. It is a maxim of the law, especially of equity, that the litigant who institutes an action in court must come with clean hands.

CHAPTER VIII.

THE LAW GROWS.

AS has been said before, legal principles are fixed. They are the same now as they were when Cæsar crossed the Rubicon. But while this is true, it often happens that the scales of justice are not held sufficiently steady to exactly weigh civil conduct in accordance therewith. In other words, it often happens that courts of justice, like merchants, give short weight. There will never be any change in these principles. Courts make decisions, afterward modify, criticise, and overrule the same, in their effort to properly apply legal principles to given questions. Legislative bodies are constantly acting, not upon new principles, but upon the necessity of applying old principles by new methods to matters of emergency, and thereby the law grows through legislation. It grows also in spite of legislation, even to the extent of annulling and setting aside legislative acts. The law grows with the growth of general

intelligence and public necessity. What was the law ten years ago, as interpreted by the courts at that time, may not be the law to-day, though no legislation has interposed, and no decision of a court has in fact been made. It often becomes apparent, upon some sudden light being thrown upon the matter of conduct or business or social enterprise, that courts are constrained to render decisions which attract wide attention because of public interest in the questions involved, and the new application of old legal principles. This is the field where erudition and judicial minds exhibit distinguished qualities, gain renown, and the work of courts is seen to the best advantage. I can present my proposition best by way of illustration.

A native was captured on the coast of Africa, and brought to Virginia and sold as a slave. His name was James Somerset. Charles Stewart became his owner. In 1770 Stewart took his slave with him to England as a body servant. While there, the slave became influenced by the teaching and education of persons who declared that a slave could not be legally held in England. He refused to obey his master and denied the

relationship of master and slave. He was seized, put in chains, placed on board a ship to be sent to Jamaica. Before the ship had sailed Thomas Watkins, Elizabeth Cady, and John Marlow, three Quakers, made an affidavit in the court of the King's Bench, the highest court in England, that Somerset was unlawfully imprisoned. A writ of habeas corpus was issued against the ship's captain and the master, commanding them to produce the body of the slave in court. These persons, in answer to the writ, stated the facts, as they claimed them to be, of the relationship of master and slave and the insubordination. The legal questions involved were argued by very able counsel on each side before that high court, and the case was held under consideration for about a year and a half. The court went so far as to suggest to the master that it would be better that the case should be disposed of without pressing it to a decision, and even suggested that it would be better that this slave should be released than that the property in all the slaves in England should be jeopardized. However, the master could not be made to believe, even by the unusual and remarkably suggestive state-

ment of the court, that it could be possible that the court could decide against him and his rights to property in and control of the slave. For more than fifty years slavery had been sanctioned in England by judicial decisions and public recognition. During that period Lords Hardwick, Talbott, and York, at different times, had decided that slavery was a legal institution. For about thirty years members of the Quaker society, and finally the body of that society, had declared against the institution of slavery as inhuman, immoral, ungodly, and unlawful. Other religious teachers and persons had been crying out against the institution. At the time when these legal proceedings were had, public sentiment against the institution, because of its immorality, had become aroused. It was argued on behalf of the master that the law upon this question was settled by the judicial decisions made at different times and of long standing, and that public acquiescence, public necessity, and public policy demanded the maintenance of the institution. The consequences of a decision against the master were portrayed in the most alarming expressions, and predictions were made of the most dire

consequences to commerce, business, social, and domestic relations, if this long-settled order of things and legal status should be disturbed. The influence of the wealthy, of royalty, great business enterprises, political and social interests, were arrayed with the master and against the slave. So strong was the showing made in these regards that the court seems to have been seriously affected thereby. Lord Mansfield, chief justice of that court, perhaps the most fearless man who ever sat on the King's Bench in England, showed his apprehension when he contemplated the consequences of a decision and, I think the only time in all his history, sought to avoid rendering the judgment of the court. In the argument of the counsel on behalf of the slave, one of them, speaking of the growth of public sentiment upon this subject, said, "Upon this subject the air of England has been clearing since the reign of Elizabeth."

Every precedent and decision that could be cited in the case was in favor of the master. It was a fact, entitled to very great influence in the case, that the public had sanctioned the institution of slavery and decisions in its favor by acquiescence

for so long a period. In behalf of the slave there was not a precedent. In his interest it was asked that the settled order of things for this long period should be broken up, that more than fifteen thousand slaves in England, those in Ireland, more than one hundred and sixty-six thousand in Jamaica, should be liberated by a sudden decision of that high court upon a legal proposition, which had as its sole foundation the claim that the institution of slavery was illegal, because it was inhuman and immoral in its very nature and results and could not be made lawful by any decision of the courts or by any acquiescence and sanction of the public, however numerous these decisions and however long standing had been the public acquiescence.

The attorneys for that black man appealed to the principles as presented in the Scriptures, the Christian religion, and by religious teachers and common humanity. There is no other case like this, ancient or modern, before a judicial tribunal in which what may be termed the "cold law" alone was clearly and fully presented on one side and only the hot blood of moral principles presented on the other. On behalf of the mas-

ter counsel could read from law books, could appeal to the teaching of law schools, and could cite the precedent of history.

On behalf of the slave there was no voice from the law; there were no law books. The court held the case under consideration until ample time was given to consider it from a legal standpoint and from a moral standpoint. The year and a half when the case was before the court was a period in which the great legal principles of morality were at work in the government. The business, social, and financial interests of the English government were excited on account of the question as to whether a case in court should be decided for the master or for the liberty of the black man. There, before that court, was the master, surrounded by such a powerful influence as perhaps no litigation in that highest court had ever presented. There was the black man with his claims, supported only by the disinterested and benevolent zeal of Christian sentiment. The day came when the judges were on the judgment seat and the master and the slave were brought before them, and the judgment was pronounced. It looks now, as it looked then, a very unequal and unprom-

ising struggle on behalf of the slave. It has been said of Lord Mansfield, who delivered the decision of the court in this case, that he decided all cases with a clear head but a cold heart. In this case, however, he seemed to have maintained his reputation for a clear head, but the evidence of a warm heart is also apparent. I quote this decision in part, sufficient to present in the most concise way its substance: "The state of slavery is of such a nature that it is impossible of being introduced on any reason, moral or political. . . . The setting fourteen thousand or fifteen thousand men at once free, loose, by a solemn opinion is much disagreeable in the effects it threatens. . . . If the parties will have judgment, *fiat justitia, ruat cælum* (let justice be done, whatever be the consequence). Fifty pounds a head may not be a high price; then a loss follows to the proprietors of above seven hundred thousand pounds, sterling. How would the law stand with respect to their settlement—wages? How many actions for any slight coercion by the masters? We cannot in any of these points direct the law. The law must rule us. In these particulars it may be matter of mighty consideration what provisions

are made or set by law. Mr. Stuart may end the question by discharging or giving freedom to the Negro. I did think at first to put the matter to a more solemn way of argument. But if my brothers agree there seems no occasion. I do not imagine, after the point has been discussed on both sides so extremely well, any new light could be thrown on the subject. If the parties choose to refer it to the Common Pleas they can give them that satisfaction whenever they think of it. An application to Parliament, if the merchants think the question of great commercial concern, is the best and perhaps the only method of settling the point for the future. . . . Whatever inconveniences therefore may follow from a decision, I cannot say this case is allowed or approved by the law of England; and therefore the black man must be discharged" (*Lofft's Report.* Second Case).

Believers in the Scriptures accept the account of divine deliverance of Joseph from slavery and prison and promotion and rulership in Egypt, and the deliverance of the three Hebrews from the burning fire, and Daniel from the lions' den. In each of these cases special divine interposition is reported.

In the case of Charles Somerset, the slave, the decision was not in accordance with the letter or spirit of the schools of law, law books, decided cases, or intellectual process of that day. A remarkable overpowering influence from some source came upon the mind of the court—a court never surpassed in the world's history for intelligence. Advancing civilization threw a greater light upon that question, and thereby revealed what courts had never been able to see before.

We are not driven to the necessity of claiming special divine interposition in behalf of the slave in this case. The great principle of public morality is strong enough, has in it such overpowering influence as that it is sufficient for any great emergency like this, when it has had due course. Doctrines recognized and declared to be the law in that case are identical with the doctrine taught by Christian teachers, by the Quaker Church, William Wilberforce, John Wesley, and many other great leaders, and were in accordance with the prayers and urgency of devout people, though they stood in conflict with what were recognized as legal precedents. Where did these peo-

ple get these doctrines which they had succeeded in enforcing in such a wonderful degree and with such amazing success? I need go no further in my claim in this case than that the secret of this most renowned decision, the consequence of which will never end, was simply the application of the principles of sound morality to a question in civil courts. The court, in this decision, made the doctrines as taught by these religious teachers the law of the land, as against the doctrines as taught by the schools of law, the law books, precedents, and decisions. That decision set free all the slaves within the jurisdiction of that court, and a Christian civilization so adjusted all the affairs, public and private, that the consequences never made a jar. One hundred and twenty-five years have gone by since that decision was rendered. The consequences have flown like a benediction in the pathway of mankind during all this period. That decision, as a precedent, has gone like a divine influence into the affairs of men. The judges who rendered it have gone to their reward, and in the great day of final judgment need not fear condemnation for that act.

In 1807 the Indiana Territorial Legislature chartered the Vincennes University, at Vincennes, Indiana. In that charter there was a section as follows: "And be it further enacted, That for the support of the aforesaid institution, and for the purpose of procuring a library and the necessary philosophical and experimental apparatus, agreeably to the eighth section of this law, there shall be raised a sum not exceeding twenty thousand dollars, by a lottery, to be carried into operation as speedily as may be after the passage of this act, and that the trustees of the said university shall appoint five discreet persons, either of their body or other persons, to be managers of the said lottery, each of whom shall give security, to be approved of by said trustees, in such sum as they shall direct, conditioned for the faithful discharge of the duty required of said managers, and the said managers shall have power to adopt such schemes as they may deem proper to sell the said tickets and to superintend the drawing of the same and the payment of the prizes," etc. The present Constitution of Indiana, adopted in 1851, prohibits lotteries. The Supreme Court of Indiana, in 1879, in the case of

Kellum *vs.* The State, 66 Indiana, 588, held that under the charter to the Vincennes University the lottery provision had become a vested right and could not be disturbed even by a constitutional provision. This decision attracted wide attention in Indiana, and was the cause of much public discussion. The people of Indiana had become much aroused upon the question of the morality of the lottery business. Churches were declaring in the form of resolutions and other action against the business. The better class of people were antagonizing it. There was a great and rapid growth of public sentiment upon this question. In 1883, in the case of the State *vs.* Woodard, 89 Indiana Reports, 110, the question of the legality of the lottery provisions in the Vincennes charter, the identical question that had been before the court in 1879 was again presented, and the court was again called upon to consider the question. No act of the Legislature had intervened since the former decision. In the interval between the former decision and the presentation of the question again the decision of the Supreme Court of the United States, in the case of Stone *vs.* Mississippi,

101 U. S. Reports, 814, had been rendered, in which that court held that the lottery business was an immoral business and could have no vested rights. When the Supreme Court of Indiana looked a second time at the question they saw in it the principle involved, what the court did not see in the former decision, not because there was any new principle involved, but because by the reason of the growth of public sentiment and legal knowledge the court was enabled to see what it was unable to see before in the same question. In the latter decision the court disregarded all the precedents which it had cited, all the argument which it had made, all its own reasoning in the former case, overruled its former decision, and decided that the lottery provision in the Vincennes University was void, and that the lottery business could not be conducted by the trustees or anyone else for that institution, because of the immorality of the business itself.

At the close of the opinion of the court in this last case in Indiana, which was written by Judge Wordon, the reporter adds the following note: "This was the last opinion written by Hon. James B. Wordon." Judge

Wordon was one of the judges who had concurred in the opinion of that court four years before expressing exactly the contrary opinion.

Slavery had existed in the United States, had been recognized by the courts, including the Supreme Court of the United States, and by the people of the United States, as a lawful institution for more than two hundred and fifty years. It was so firmly established and so influential that men in public positions hazarded their personal safety by even suggesting that it ought to be legally interfered with. There was no prospect in the least of taking any step whatever to disturb it as an institution. The Supreme Court of the United States even had become so dominated and subjugated by the influences of that institution that for some time it disregarded every settled and fixed fundamental principle of law and morality, and in the face of the great precedent in the case of Somerset *vs.* Stewart, to which I have referred, decided by the King's Bench in England, by which slavery had been abolished, and decided that the black man had no rights that the white man was bound to respect. The decision in the

English case fell like a benediction, and has gone into every civilized government with its great influence, and shall shine brighter and brighter forever.

The case of Dred Scott *vs.* John F. A. Stanford, decided in 1857, more than eighty years after the English case, by the Supreme Court of the United States, going to the extreme against the rights of the colored man and in favor of the inhuman and immoral institution of slavery, aroused the antagonism and warlike spirit of a large class of people, and was one of the greatest factors in producing civil war in the United States.

Notwithstanding this decision of our own highest court, notwithstanding the fact that no legislation interfering with the existence of slavery was possible in the United States, notwithstanding the claim, and general acquiescence therein, that the government of the United States could not interfere with the institution of slavery in the States where it existed by legislation or otherwise, yet there came a day when the education of the people of the nation, under the excitement of those stirring days, had so rapidly advanced that under the law of public neces-

sity Abraham Lincoln, by one stroke, as chief executive of the nation, could and did destroy that institution, as a war necessity, for the preservation of the government. The growth in the comprehension of the law concerning that institution from 1861 to 1863 was greater than the growth of education upon that subject for the two hundred and fifty years previous.

Ten years after the close of the civil war one of the most distinguished writers and statesmen in the nation prepared and caused to be published an article, in which he asserted that slavery, in fact, had never been abolished in the United States, because Abraham Lincoln, as president, had no authority for issuing the Emancipation Proclamation, and that the proclamation was void. The article, however, only served to remind the people of what had once been the public impression, and how great had been the growth of education upon that subject, and caused a smile at the temerity of the writer.

A case was recently presented to the Supreme Court of Indiana in which a widow had brought suit against a saloon keeper and his landlord for damages done to the

widow's property, and the enjoyment of her home, by the establishment and maintenance of a saloon adjoining her residence. The defendants pleaded a license under the law of the State authorizing the saloon business. The license law of the State of Indiana made no exception as to locality, and the saloon keeper flaunted his license in the face of the widow with the utmost confidence that she was powerless and without relief under the law. This particular question had never before been presented to any court. Our Supreme Court, in its first decision upon that question, held that the widow was not entitled to any relief. A petition for rehearing was presented, considered, and sustained. The court having thus opened the case for reconsideration gave to the question presented remarkable and very unusual attention, and finally decided; first, that the widow had a right of action; second, that the saloon keeper and also his landlord, who had leased the property for saloon purposes, were each liable for damages; third, that the license was no protection to the business in that locality; fourth, that an orderly saloon in an orderly residence neighborhood is, *per se*, a nuisance. In reaching these conclusions the

court was compelled to disregard and annul largely the letter of the license law; to declare that no statute could authorize by its provisions or give its protection to any act or business such as the business in the case presented; that the saloon business is offensive to good morals and sound sentiment. This decision is without precedent upon the issue presented. The decision is a departure from the view of the law and of the business as heretofore taken. This decision most forcibly illustrates the growth in the view of the law upon this subject. The Legislature of Indiana can grant no relief from the effect and consequences of this decision, for the reason that rights of property and enjoyment of the same as recognized in the decision cannot be interfered with without compensation. See Haggart et al *vs.* Stehlin et al, 137 Ind., 43.

We have just recently had fine exhibitions of the growth of the law exhibited in regard to prize fighting.

In January, 1894, a prize fight between James J. Corbett and Charles Mitchell was duly advertised to be given in the State of Florida. The governor called out the militia to prevent the immoral and demoral-

izing exhibition. A court of justice, upon application, issued an injunction against the use of the militia for the purpose for which it had been called, declaring that there was no law in Florida against prize fighting, and thereby prevented all interference on the part of the State troops and the police authorities. The Governor of Texas, on being informed by his attorney general in the month of October, 1895, that there was no law in Texas to prevent prize fighting, assembled the Legislature of the State to meet the emergency, and within three hours after that body was organized a law had been passed and signed by the governor forbidding such brutal exhibitions. Within less than one month after this enactment in Texas, in response to the public demand of advanced civilization, when the same exhibition was undertaken to be given in the State of Arkansas, the chief executive, his attorney general, and the court decided upon, and put in execution, judicial process, and prevented the same, not upon an act of the Legislature, but upon a construction of the law as it had existed ever since the organization of the State, and provisions almost identical with

those that had had long existence in the States of Florida and Texas, the provisions of which were ample to have met the emergency in either of these States, if properly construed, to prevent a prize fight.

The force of public opposition has thrown such a light upon the real character and demoralizing influences of prize fighting that the law, as it is, has grown to meet the emergency, until prize fighting is clearly unlawful in every State in the Union. National and State Constitutions grow with the experience and enlightenment of men. The word "morality" itself is a thing of growth. This word means much more than it once did, and some day will mean a vast deal more to us than it does now. Growth in the comprehension of no word, perhaps, has broadened more in recent years than the word "cruelty." Its scope now covers many subjects and a wide field. There was a time when a man could lawfully whip his wife in moderation, beat his children to the limits of brutality, and kill his slave or his animals with impunity, without being charged with cruelty. We have now reached the point in our comprehension of this word where it is dangerous for a man to kick his

own dog, fail to feed his own horse, or even threaten to strike his own wife. There was a time when the word "cruelty" had its own particular and narrow meaning. Now it is merely one of the branches of immorality. A cruel man is a bad man, and a bad man cannot be a moral man.

I have said that the law grows. I have made this declaration in this form for convenience and for the purpose of making myself more easily understood. Strictly speaking, the law does not grow, but the comprehension of legal principles does grow. Principles as set forth in the Ten Commandments will be no greater in the day of final judgment than when they were written down in the presence of Moses on tables of stone, but every generation will learn something new concerning these principles and will see in them what has not been seen before. The history and growth in the comprehension and meaning of the word "morality" is a most fascinating study. Nothing short of the historic evolution of morality for two thousand years can furnish full comprehension of its meaning. The volumes that have been written upon this subject would make such a weight as few

men could carry at one time. The word "morality," as used in the Constitution of Indiana and the Constitutions of other States and in the judicial decisions of other States, must be held by faithful judges to contemplate *all that ever can be found at any time by the most profound research under the most brilliant light within its boundaries.* Civil law is not founded upon any military, martial, business, or social ideas. The abiding and fundamental principle in civil law is morality, with its honesty, fair dealing, and justice to all men. The historic method of explanation of legal principles which is the method accepted by courts that are well informed on legal principles has narrowed and changed the meaning of many words, and even dropped some words and whole expressions out of definitions, but this method has, for three thousand years, steadily, but never as rapidly as within recent years, developed, enlarged, and strengthened the word "morality." I venture to prophesy for the future that the word "morality" will respond to the inquiries of faithful courts by the revelation of many beautiful and most important ideas heretofore and now unseen. Writers on all

branches of the law well know that the individual statements of legal propositions have little weight. Therefore it is not only the most common custom, but an absolute necessity, that any writer should fortify his statements by quotations from good authority. I have heretofore quoted from Austin's works on jurisprudence, because he is perhaps the best authority on historic development of legal principles, and his high authority is universally recognized by the legal profession.

I feel that I can do no better in closing this chapter than to quote at some length from this high authority. In doing so let me call special attention to the fact that the author, in what I shall quote, is not merely lecturing upon the subject, but is considering, from a legal standpoint, the subject of "morality." He uses the words "ethics" and "ethical," meaning by these words exactly what was then and is now meant by the word "morality." This is shown in his work, and also in quotations made from him in another chapter of this work.

In Vol. I, pp. 137–138, this author says:

"If the elements of ethical science were widely diffused, the science would advance with proportionate rapidity.

"If the minds of the many were informed and invigorated, their coarse and sordid pleasures and their stupid indifference about knowledge would be supplanted by refined amusements and by liberal curiosity; a numerous body of recruits from the lower of the middle classes, and even from the higher classes of the working people, would thicken the slender ranks of the reading and reflecting public, the public which occupies its leisure with letters, science, and philosophy; whose opinion determines the success or failure of books, and whose notice and favor are naturally courted by the writers.

"And until that public shall be much extended, shall embrace a considerable portion of the middle and working people, the science of ethics, with all the various sciences which are nearly related to ethics, will advance slowly.

"It was the opinion of Mr. Locke, and I fully concur in the opinion, that there is no peculiar uncertainty in the *subject* or *matter* of these sciences; that the great and extraordinary difficulties by which their advancement is impeded are *intrinsic*, are opposed by sinister interests or by prejudices which are the offspring of such interests; that if they

who seek or affect to seek the truth would pursue it with obstinate application and with due '*indifferency*' they might frequently hit upon the object which they profess to look for. Now, few of them will pursue it with this requisite 'indifferency' or impartiality so long as the bulk of the public which determines the fate of their labors shall continue to be formed from the classes which are elevated by rank or opulence, and from the peculiar professions or callings which are distinguished by the name of 'liberal.' In the science of ethics, and in all the various sciences which are nearly related to ethics, your only sure guide is general utility. If thinkers and writers would stick to it honestly and closely they would frequently enrich these sciences with additional truths or would do them good service by weeding them of nonsense and error. But since the *peculiar* interests of particular and narrow classes are always somewhat adverse to the interests of the great majority, it is hardly expected of writers whose reputation depends upon such classes that they should fearlessly tread the path which is indicated by the general well-being.

"The *indifferency* in the pursuit of truth

which is so earnestly inculcated by Mr. Locke is hardly to be expected of writers who occupy so base a position; knowing that a fraction of the community can make or mar their reputation, they unconsciously or purposely accommodate their conclusions to the prejudices of that narrower public, or, to borrow the expressive language of the greatest and best of philosophers, they begin with espousing the *well-endowed* opinions in fashion, and then seek arguments to show their beauty or to varnish or disguise their deformity."

Also in same volume, at pages 141 to 143:

"This patience in investigation, this distinctness and accuracy of method, this freedom and '*indifferency*' in the pursuit of the useful and the true, would thoroughly dispel the obscurity by which the science is clouded, and would clear it of most of its uncertainties. The wish, the hope, the prediction of Mr. Locke would in time be accomplished, and 'ethics' would rank with the sciences which are *capable of demonstration.* The adepts in ethical as well as in mathematical science would certainly agree in their results, and as the jar of their conclusions gradually subsided a body of doc-

trine and authority to which the *multitude* might trust would emerge from the existing chaos. The direct examination of the multitude would only extend to the elements and to the easier though more momentous of the derivative practical truths. But none of their opinions would be adopted blindly, nor would any of their opinions be obnoxious to groundless and capricious change. Though most or many of their opinions would still be taken from *authority*, the authority to which they would trust might satisfy the most scrupulous reason. *In the unanimous or general consent of numerous and impartial inquirers* they would find that mark of trustworthiness which justifies reliance on authority wherever we are debarred from the opportunity of examining the evidence for ourselves.

"With regard, then, to the perplexing difficulty which I am trying to solve or extenuate the case stands thus:

"If utility be the proximate test of positive law and morality, it is simply impossible that positive law and morality should be free from defects and errors. Or (adopting a different though exactly equivalent expression), if the principle of

general utility be our guide to the divine commands, it is impossible that the rules of conduct actually obtaining among mankind should accord completely and correctly with the laws established by the Deity. The index to his will is imperfect and uncertain. His laws are signified obscurely to those upon whom they are binding, and are subject to inevitable and involuntary misconstruction.

"For, *first*, positive law and morality, fashioned on the principle of utility, are gotten by observation and induction from the tendencies of human actions; from what can be known or conjectured, by means of observation and induction, of their uniform or customary effects on the general happiness or good. Consequently till these actions shall be marked and classed with perfect completeness, and their effects observed and ascertained with similar completeness, positive law and morality, fashioned on the principle of utility, must be more or less defective and more or less erroneous. And these actions being infinitely various and their effect being infinitely diversified, the work of classing them completely and of collecting their

effects completely transcends the limited faculties of created and finite beings. As the experience of mankind enlarges, as they observe more extensively and accurately and reason more clearly and precisely, they may gradually mend the defects of their legal and moral rules, and may gradually clear their rules from the errors and nonsense of their predecessors. But though they may constantly approach, they certainly will never attain to a faultless system of ethics, to a system perfectly in unison with the dictates of general utility, and therefore perfectly in unison with the benevolent wishes of the Deity.

"And, *secondly*, if utility be the proximate test of positive law and morality, the defects and errors of popular or vulgar ethics will scarcely admit of a remedy. For if ethical truth be a matter of science, and not of immediate consciousness, most of the ethical maxims which govern the sentiments of the multitude must be taken without examination from human authority. And where is the human authority upon which they can safely rely? Where is the human authority bearing such marks of trustworthiness that the ignorant may hang

their faith upon it with reasonable assurance? Reviewing the various ages and the various nations of the world, reviewing the various sects which have divided the opinions of mankind, we find conflicting maxims taught with equal confidence and received with equal docility. We find the guides of the multitude moved by sinister interests or by prejudices which are the offsprings of such interests. We find them stifling inquiry, according to the measure of their means; upholding with fire and sword or with sophistry, declamation, and calumny the theological and ethical dogmas which they impose upon their prostrate disciples. Such is the difficulty. The only solution of which this difficulty seems to admit is suggested by the remarks which I have already submitted to your attention, and which I will now repeat in an inverted and compendious form.

"In the first place, the diffusion of ethical science among the great bulk of mankind will gradually remove the obstacles which prevent or retard its advancement. The field of human conduct being infinite or immense, it is impossible that human understanding should embrace and explore it com-

pletely. But by the general diffusion of knowledge among the great bulk of mankind, by the impulse and the direction which the diffusion will give to inquiry, many of the defects and errors in existing law and immorality will in time be supplied and corrected.

"Secondly, though the many must trust to authority for a number of subordinate truths, they are, competent to examine the elements which are the groundwork of the science of ethics, and to infer the more momentous of the derivative practical consequences.

"And, thirdly, as the science of ethics advances and is cleared of obscurity and uncertainties, they who are debarred of opportunities of examining the science extensively will find an authority whereon they may rationally rely in the unanimous or general agreement of searching and impartial inquiries."

Again, on pages 177 to 180:

"The science of ethics (or, in the language of Mr. Bentham, the science of deontology) may be defined in the following manner: It affects to determine the test of positive law and morality, or it affects to determine the principles whereon they must be fashioned in order that they may merit approbation. In other words, it affects to

expound them as they should be; or it affects to expound them as they ought to be; or it affects to expound them as they would be if they were good or worthy of praise; or it affects to expound them as they would be if they conformed to an assumed measure. The science of ethics (or simply and briefly ethics) consists of two departments, one relating especially to positive law, the other relating to positive morality. The department which relates specially to positive law is commonly styled the *science of legislation*, or, simply and briefly, *legislation*. The department which relates specially to positive morality is commonly styled the *science of morals*, or, simply and briefly, *morals*.

"The foregoing attempt to define the science of ethics naturally leads me to offer the following explanatory remark. When we say that a human law is good or bad, or is worthy of praise or blame, or is what it should be, or is what it ought to be, or what it ought not to be, we mean (unless we intimate our mere liking or aversion) this: That the law agrees with or differs from a something to which we tacitly refer it as a measure or test. For example, according to either of the hypotheses which I stated

in preceding lectures, a human law is good or bad as it agrees or does not agree with the law of God; that is to say, with the law of God as indicated by the principle of utility or with the law of God as indicated by the moral sense. To the adherent of the theory of utility a human law is good if it be generally useful, and a human law is bad if it be generally pernicious. For, in his opinion, it is consonant or not with the law of God inasmuch as it is consonant or not with the principles of general utility. To the adherent of the hypothesis of a moral sense a human law is good if he likes it, he knows not why; and a human law is bad if he hates it, he knows not wherefore. For in his opinion his inexplicable feeling of liking or aversion shows that the human law pleases or offends the Deity.

"To the atheist a human law is good if it be generally useful, and a human law is bad if it be generally pernicious. For the principle of general utility would serve as a measure or test, although it were not an index to an ulterior measure or test. But if he call the law a good one without believing it useful, or if he call the law a bad one without believing it pernicious, the atheist

merely intimates his mere liking or aversion. For unless it be thought an index to the law set by the Deity an inexplicable feeling of approbation or disapprobation can hardly be considered a measure or test. And in the opinion of the atheist there is no law of God which his inexplicable feeling can point at. To the believer in supposed revelation a human law is good or bad as it agrees with or differs from the terms wherein the relation is expressed.

"In short, the goodness or badness of a human law is a phrase of relative or varying import. A law which is good to one man is bad to another in case they tacitly refer it to different or adverse tests. The divine laws may be styled good in the sense with which the atheist may apply the epithet to human. We may style them good or worthy of praise, inasmuch as they agree with utility considered as an ultimate test. And this is the only meaning with which we can apply the epithet to the laws of God. Unless we refer them to utility, considered as an ultimate test, we have no test by which we can try them. To say that they are good because they are set by the Deity is to say that they are good as measured or tried

by themselves. But to say this is to talk absurdly; for every object which is measured or every object which is brought to a test is compared with a given object other than itself. If the laws set by the Deity were not generally useful, or if they did not promote the general happiness of his creatures, or if their great Author were not wise and benevolent, they would not be good or worthy of praise, but were devilish and worthy of execration.

"Before I conclude the present digression I must submit this further remark to the attention of the reader.

"I have intimated in the course of this digression that the phrase *law of nature* and the phrase *natural law* often signifies the law of God.

"Natural law as thus understood and the *natural law* which I mentioned in my fourth lecture are disparate expressions. The *natural law* which I there mentioned is a portion of positive law and positive morality. It consists of the human rules, legal and moral, which have obtained at all times and obtained at all places.

"According to the compound hypothesis which I mentioned in my fourth lecture,

these human rules, legal and moral, have been fashioned on the law of God as indicated by the *moral sense*. Or, adopting the language of the classical Roman jurists, these human laws, legal and moral, have been fashioned on the divine law as known by *natural reason*.

"But besides the human rules which have obtained with all mankind there are human rules, legal and moral, which have been limited to peculiar times or limited to peculiar places.

"Now, according to the compound hypothesis which I mentioned in my fourth lecture, these last have not been fashioned on the law of God, or have been fashioned on the law of God as conjectured by the light of utility.

"Being fashioned on the law of God as shown by an infallible guide, human rules of the first class are styled the *law of nature;* for they are not of human position purely or simply, but are laws of God or nature clothed with human sanctions. As obtaining at all times and obtaining at all places, they are styled by the classical jurists *jus gentium* or *jus omnium gentium* (the law of nations or the law of all nations)."

CHAPTER IX.

EVIL MUST BE SUPPRESSED AND GOOD PROMOTED.

THE growth of public morality in civil government has been like the advance of an irresistible army. It has been checked and compelled to halt and fight long, desperate battles, but has never retreated. It has utterly overthrown, crushed, and destroyed governments, kings, rulers, and people who have opposed its advance. It is persuasive, patient, and kind to such as heed warnings, but merciless and relentless to those who will not yield. It will not consent that immorality, or any system or enterprise or business that is immoral, or tends to immorality, or has an immoral influence, shall in any way be sanctioned or excused. The institution of slavery, which claimed divine sanction and the authority of divine revelation, which was once accepted by all men, became an institution especially offensive to the advance of morality, and was ultimately destroyed by the decision of the court upon moral principles in England, and

by the action of the chief executive in the United States upon the same ground, and other nations are obeying the same high command and abolishing the institution among their people, so that it is unknown to-day among all civilized people. Gambling, for amusement or business, was once thought to be a mere matter of individual taste and privilege, but when its immorality and bad influence were made to appear it was outlawed everywhere from nation to nation. Once the gladiators furnished entertainment for a multitude of men, women, and children by sanction of government and universal consent; but that has gone with the fierce brutality of long ago, and we have so far progressed that prize fighting may now be understood as unlawful in every State in this Union, and is rapidly being driven from the soil of other nations. We have so far progressed in our application of the sensitive demands of morality in this direction that bear baiting, bull fighting, cock fighting, dog fighting, and even rat baiting are all made unlawful.

Wager of battle between disputants over personal matters or property rights was once a legal method of settling questions, but we

have now reached the point where dueling, fighting, and even quarreling over matters of dispute are forbidden by law. The lottery business, once taken to be a legitimate business and matter of amusement, so highly regarded in the United States within the recollection of persons now living as that it was made the means of raising funds for erecting public buildings in the capital city of the nation; was chartered by provision of the Indiana Territorial Legislature in 1807 in the Vincennes University in Indiana, by which a library for that institution of learning was to be secured; was considered proper means for raising money with which to build churches, and furnished entertainments for church socials; but the immoral character, influence, and results of the lottery business became so serious that it was declared by Lord Holt from the King's Bench in England long ago, without any act of Parliament upon the subject, to be unlawful because of its immorality. For the same reason it was always unlawful if the principles of law had been properly applied in the United States. Every State in this nation has finally declared the lottery business to be unlawful, as has the Supreme Court of the United

States. It has been hunted down and been driven from our shores, and even from its temporary resting place in the government of Mexico, because of the immorality and bad influence that necessarily followed in its wake. There is one universal, thoroughly settled rule of law in this nation, not founded upon legislation, but older than legislation, often, however, recognized and supported by legislation, that any business that is immoral, tends to immorality, or results in promoting immorality, is unlawful. It is not only unlawful, but cannot be made lawful by any act of the Legislature, nor long maintained as lawful even by decisions of any court of last resort. There are two chief concerns in civil government which have been established by the States in the Union:

First, to promote morality, and, second, to suppress immorality.

I quote again upon this proposition, Art. 8, Sec. 1, of the present Constitution of Indiana: "Knowledge and learning generally diffused throughout a community being essential to the preservation of free government, it shall be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual, scientific, and agricul-

tural improvements, and to provide by law for a general and uniform system of common schools, where tuition shall be without charge and equally open to all."

It must be kept in mind that morality is a science; as much so as mathematics, the oldest science known among men. In pursuance of the constitutional provision I have just quoted, the Legislature of Indiana long ago chartered the State Board of Agriculture to encourage the culture of whatever the soil can produce. The Legislature has also established at great expense, in obedience to this section of the Constitution, a State University for general literary culture, Purdue University for special instruction, State Normal School for preparing teachers, schools for the instruction of the deaf and dumb and blind and the feeble-minded, and a general system of common schools providing for the regulation and licensing of school-teachers. This section is by far the most important section in our Constitution, and the first subject in the section, the chief and greatest subject which the Legislature is commanded to "encourage by all suitable means," is *morality*. Morality is a specific and independent subject in the Con-

stitution, as much as science, agriculture, or education.

This section was taken as a section from our former Constitution, with only two changes of any importance. One of these is that morality is taken from a subordinate position in the former Constitution and given a chief place in the section in our present Constitution, and the subject of education is added.

The Legislature is given the power, and is commanded by this constitutional provision to do anything and everything that may be necessary or required to promote education, and to suppress everything that retards or has a tendency to retard, interfere with, or prevent education. It has the same authority and has the same command as to the subject of agriculture and scientific information, and has the same authority and has the same command as to the subject of morality. The Legislature in the discharge of its duty has carefully provided a public school system with strict requirements as to the qualifications of teachers. If the Legislature were to provide that the schools should teach that the earth is flat, and that the sun literally rises and sets, it will be

conceded that such a law would be absolutely void.

The story is told that in an early day in Indiana, long before this constitutional provision and the coming of our common school system, a school-teacher went into one of our country neighborhoods to secure the signatures of parents to an article employing him as a teacher and agreeing to send their children to his school. He was so fortunate as to be admitted to one of those quasi social gatherings so common in an early day in this State, known as wool pickings, where the women of the neighborhood met together to enjoy themselves socially, picking the burs and Spanish needles out of the wool, so that it could be used. He made his business known to the women, and asked those who were heads of families to sign it, and the others to speak to their husbands or fathers about it so that they would be ready when he went around to see them. He was a fluent talker, and had had much experience in his work, and had made a very favorable impression upon his auditors. He was on the point of taking his departure when one of the women informed him that there had been trouble in that neighborhood with

a former teacher on the question whether the earth was round or flat, and that she and her husband would want to know his views on that subject before they signed that article. Another woman showed very clearly that the subject was a very familiar one to her, and that she differed from the first speaker, and demanded that he should announce his views. He saw at once that he had a difficult case on his hands, but his skill was equal to the occasion. Every eye was on him, and they awaited his answer. He answered that he had been educated in both schools and would teach that the earth was round or flat, just as they preferred. After the adoption of this constitutional provision and the legislation in pursuance thereof, that teacher with all the quacks like him took their departure from Indiana. It would not be a pleasant subject for me, a native Hoosier, to dwell upon or consider at great length the condition of Indiana as to illiteracy when our present Constitution was adopted. But I take great pleasure in calling attention to the fact that Indiana has made such progress under this constitutional provision and her favorable legislation, with her licensed and qualified school-teachers

and universities and schools, that no Hoosier need be ashamed of the showing we are now able to make. We have also made commendable progress in agriculture and scientific departments.

I make the statement that we have made less progress in moral science and morality than we have in any other science; much less than in education or agriculture. It will be found, upon investigation, that old methods of teaching have been abandoned, and amazing improvements in methods and in good results have been accomplished with wonderfully important and rapidly growing facilities, conveniences, and capacity for teaching and imparting and acquiring education; old methods of agriculture have been abandoned, and the fields have been cleared of trees, stumps, and stones. Machinery and mechanical improvements have been brought into use to such an extent that a person can hardly comprehend the bettered condition and wonderful advance that has been made upon this subject since the adoption of our present Constitution. The discoveries of our people, and the adoption of the discoveries made by others, with instructions given, have made the growth

of scientific information in the same period in our State a matter of constant amazement. In education, agriculture, and science it is necessary only to call attention to the subjects to startle a person with his own observations and the evidences all about him of the amazing advance in these regards. Now, when I ask my fellow-citizens in this State whether we have progressed in sound morality since 1851, they stare at me and either speak with great hesitation and uncertainty or ask time to consider before they attempt to answer at all.

We are proud of our advance in education, in agriculture, and scientific information in Indiana during the last twenty-five years; but no man is at all proud or satisfied with our advance in morality. I do not want to speak disparagingly upon this subject further than I am compelled. We *have* advanced in moral culture, and have reason for encouragement, not so much at the extent of our advancement, but that we have advanced at all, and have not in fact retreated. I think no man who has made careful investigation will claim that moral improvement has been equal to our improvement in these other subjects. This same

state of facts in regard to Indiana is true generally in regard to every other State in the Union. There has either been less interest taken in the subject of morality than in education, or agriculture, or the sciences, or else there has been some greater obstruction in this line of culture. Let us look briefly at the methods of promotion in other subjects, and for the obstruction thereto, and for the promotion of morality and obstruction thereto, for the purpose of finding, if possible, the cause which has produced this disparagement. The State of Indiana, by her constitutional provision and legislation based upon it, took the subjects of morality, agriculture, scientific information, and education under its special patronage for the purpose of promoting these subjects. For the purpose of promoting agriculture the Legislature passed laws providing for a system of highways, drainage, and many other matters, and also, by penal acts, fines, and imprisonments, restraining stock from running at large to prey upon the crops, fencing of railroads, cutting of noxious weeds, and has encouraged by rewards care in the productions of the soil,

and in every way preventing what would result in or tend to the general obstruction of agriculture. There is not one influence that is known to have an injurious effect upon general agriculture that is not forbidden by the law of Indiana and sought to be removed.

Concerning the subjects of education, agriculture, or science, which are all the subjects except morality mentioned in the constitutional provision referred to, nothing is permitted by law, or in any way legalized or sanctioned, which is understood to have a tendency to interfere with or obstruct the work or development of either of these subjects.

These subjects have a free course and a full chance to exert all their influence. Their pathway is cleared before them. Universities, colleges, schools, and about fourteen thousand teachers are maintained and enormous expense incurred by the State in specific instruction upon these subjects. For all of this, with the great prospects ahead of us in these regards, let us all rejoice. Our school law provides that teachers must pass an examination covering certain branches of education, and such branches must be taught, but they are not

required to be examined upon moral science or to teach it.

In many schools in Indiana, heretofore, teachers have been given to understand that they were not to teach the whole truth upon certain subjects which are not only matters of scientific truth, but also important to the interest of public morality.

To the credit of our last Legislature it passed an act compelling school board trustees, superintendents, and teachers to teach the whole truth. It is humiliating to admit that evil influences have been so great in our State, as has been true of many other States, that even science was compelled to close its lips.

It is another evidence of the irresistible power of moral force that it can gain such victories.

Strange as it may seem science had submitted and the public school system had been subjugated, and morality alone came to the rescue.

Hereafter the injurious effects of alcoholic drinks and narcotics will be taught under compulsion in all our public schools. Morality is the protecting angel for all truth.

I have said that the Legislature of Indiana has taken care and provided at great expense and by suitable means for general education and specific instruction in agriculture and the sciences, but I inquire, What system and what means have been provided for specific instruction in moral science?

This science, though made the chief subject and greatest concern in the Constitution, has absolutely no legislative provision for its promotion. There must be legislative provision made for instruction in the principles and rules and their application in moral science. Whatever instruction in the great department of morality there may have been in the public schools it has been incidental and as a side matter of minor importance to other branches of education of absolute importance.

Heretofore the Legislature has contented itself in regard to this subject by a somewhat vigorous effort to suppress acts of immorality.

The theory is thoroughly settled that if an act, transaction, or business is immoral, or tends to immorality, it must be suppressed by law.

The mere effort, however vigorous, on

the part of the State to suppress immorality is not sufficient to meet the demands upon this subject.

But the effort to suppress immorality has not been and is not now consistent, and fails at most important points. To this I shall presently call attention and attempt to show what I believe to be a serious failure in this regard.

I call attention to the suitable means and methods by which the State has sought to promote the interest of these other subjects.

For education it has chartered and supports great institutions and a general system. For agriculture it has done the same thing. Like provisions have been made for science.

After the most careful thought and investigation on the part of Robert Dale Owen, Governor Whitcomb, and the other distinguished men who devised our common school system, it was determined that the State should take this subject under its special care and, among other things, for the purpose of promoting the efficiency and protecting the business and profession of teaching, that a license system for teachers was the best plan. This plan has worked

so well that it stands to-day with universal approbation.

By this plan we have developed a great army of very efficient and successful teachers whose attainments are in demand and whose employment is sure.

The inefficient teachers who could often secure employment because willing to accept low wages have all departed or else qualified themselves for the work. Such persons were generally successful competitors against better qualified applicants, on the ground of economy.

This plan of examining and licensing teachers has wonderfully promoted and protected the profession and business of school-teaching and the cause of education for which it was designed.

For the purpose of promoting the science of medicine and surgery after a most thorough investigation by the most intelligent men in these professions, and others whose judgment was entitled to great weight, it was decided that the best method to accomplish this end was by a test of fitness and license for practitioners. Though this system has been in existence less than ten years in Indiana it has accomplished

more for this science in that short period than had been done in fifty years before, and is universally approved.

This system has had like results in other States. A license system for ministers in some form is now adopted by nearly all religious denominations as the best system for promoting the Gospel and protecting the business and vocation of preaching.

Whenever the State desired specially to promote a business or enterprise by controlling it, it has been settled by the experience of all the past that the best method to accomplish the end designed is by a license system.

This has been proven true in education, in agriculture through incorporated societies, in the science of medicine and surgery, in marriage, and, in fact, in all corporated or private enterprises.

Incorporation is a license. The business and individuals licensed or incorporated to conduct any enterprise are thereby favored and protected for the benefit of the enterprise.

Farmers, merchants, manufacturers do not need license, because they can take care of themselves.

No profession, business, or enterprise is

licensed or incorporated upon a theory or purpose of lessening or restraining the magnitude of the profession, business, or enterprise. Because of the good results license systems are increasing for laudable enterprises, as penal enactments are increasing against immoral enterprises.

The only purpose of a penal act is to suppress; so the only purpose a license act can have is to promote.

As a good illustration of the purpose and results of a license theory I use the Methodist Episcopal Church.

It was organized a little more than a hundred years ago with six members, and began work with a license system for its ministry, and undertook thereby the evangelization of the world. So successful has it been by virtue of that system that its growth has been fabulous beyond the result in any other denomination, until now it numbers its communicants and ministers in every clime on the globe, and its millions of money follow their footsteps.

This is the working of a license system by an ecclesiastical government, but it is the same system in principle when worked by a civil government for any enterprise.

Such a system has never failed to produce like results when applied to any enterprise unless possibly in the case of some business too insignificant to be promoted by any aid.

The inevitable conclusion is that a license system is a wise and necessary provision for the promotion and protection of any laudable enterprise that needs the special supervision of the State for the good it may be able to do the public.

License systems have been tested and tried often and by many governments, for the purpose of preventing the evil effects of immoral enterprises. These experiments have been thoroughly made and this system thoroughly tested for this purpose and found in every instance to produce results exactly the reverse of what was desired.

This theory of legislation has been applied to gambling, lotteries, prostitution, and the exhibitions and enterprises which were recognized as dangerous to public morals and public peace and under conditions more or less severe, with a revenue provision.

These license systems for each of these immoral enterprises have proven failures so serious as to be alarming, and have been

abandoned almost universally where civilized nations exist and are remembered with disgust and loathing by decent people.

Only a few years ago the Louisville Lottery opened its offices and advertised its business in the cities and towns all over the United States with impunity, and many people who stood high in business and society invested largely and regularly in the enterprise.

That organization was licensed by a special act of the Kentucky Legislature, and presided over and officered by distinguished men who were proud of, and ready to die for, their reputation.

The act of the Legislature had provided that this licensed and chartered lottery should pay annually to the State treasury a sum of money.

The Court of Appeals, in deciding upon this feature of the legislative act in the case of Commonwealth *vs.* Douglass, before referred to in this work, said: "When we consider that honesty, morality, religion, and education are the main pillars of the State, and for the protection and promotion of which government was instituted among men, it at once strikes the mind that govern-

ment through its agents cannot throw off these trust duties by selling, bartering, or giving them away."

In 1867 the Legislature of Mississippi granted a charter (license) to the Mississippi Agricultural, Educational, and Manufacturing Aid Society, with the right to issue and sell lottery tickets and to conduct the lottery business in consideration of the annual sum of $5,000, and $1,000 in tax and one half of one per cent of the amount received from the sale of the tickets to be paid into the State treasury for the privilege granted.

A question arose as to the validity of that act of legislation. The society claimed that it had secured vested right by virtue of that legislation, public acquiescence, and large investment of money in the business. That question passed through the regular course to the Supreme Court of the United States, in the case of Stone et al *vs.* Mississippi, 101 U. S., 814. That court considered the act of the Legislature with all that it contemplated, and also the lottery business with all that it contemplated, and the real character of the business, and decided that the lottery business was inherently immoral, and the legislative act chartering the business was

void. Concerning lotteries the court said: "We are aware that formerly, when the sources of public revenue were fewer than now, they were used in all or some of the States, and even in the District of Columbia, to raise money for the erection of public buildings, making public improvements, and not infrequently for educational and religious purposes; but this court said, more than thirty years ago, speaking through Mr. Justice Grier, in Phalen *vs.* Virginia, 8 How., 163, 168, that 'experience has shown that the common forms of gambling are comparatively innocuous when placed in contrast with the widespread pestilence of lotteries. The former are confined to a few persons and places, but the latter infests the whole community; it enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor; and it plunders the ignorant and the simple. . . . That they are demoralizing in their effects, no matter how carefully regulated, cannot admit of a doubt. When the government is untrammeled by any claim of vested rights or chartered privileges no one has ever supposed that lotteries could not be lawfully suppressed, and those who manage them punished se-

verely as violators of the rule of social morality.'"

Of the legislative act the court said, "No Legislature can bargain away the public morals or the public health or the public peace." The court held that the act of the Legislature of Mississippi licensing the lottery was void.

Finally the public came to see by the light thrown upon the business that it was immoral and dishonorable. The decision of the Court of Appeals in Kentucky to which I have referred followed, and declared that the legislative act licensing the Louisville Lottery was void, and that no act could be passed that would be valid for such business because of its immorality, and the Louisville Lottery fled from the State of Kentucky never to return.

A like history has been recorded of the Louisiana Lottery since the Louisville Lottery was driven out of existence by the courts.

The law is now settled in this nation that no Legislature can license the lottery business, because of its bad effect upon public morals.

The United States government has arrayed

all its power and closed its mails against this business, and woe be to the transgressors.

President Harrison made it the subject of a special message to Congress, urging immediate action for the protection of an imperiled nation.

The Louisiana Lottery had secured such an influence in the State of Louisiana that it is evident it could not have been broken up by action of State authorities if the United States government had not closed its mails and declared hostility against it.

The judicial action against the lottery business is perhaps the best illustration of the wonderful growth in public sentiment against immorality, and also forcibly shows the growth of legal comprehension of moral principles and their application to civil affairs.

Extensive and expensive provisions have been made for teaching and promoting all the other subjects mentioned in the constitutional provision in Indiana except morality, and futile attempts have been made to authorize things against the interest of morality.

It may be said that the State in the erection of great buildings, and a school system

and costly provisions for education, and by her chartered institutions and aid to agriculture, and her encouragement and aid to scientific culture, has sought to aid and has promoted the subject of morality.

But, I ask, Has not morality, unaided by the State, done more for each of these subjects named within the Constitution than they have done for morality with all their aid?

I humbly claim for morality stately buildings, chartered institutions, public funds, legislative provision commensurate with the importance of the subject—in the language of the Constitution, "suitable means" for its promotion.

Jehoshaphat, in the third year of his reign, sent to his princes Ben-hail, Obadiah, Zechariah, and to Nethaneel and to Michaiah, to teach in the cities of Judah, and with them nine Levites and two priests.

"And they taught in Judah, and had the book of the law of the Lord with them, and went about throughout all the cities of Judah, and taught the people."

It is recorded that Jehoshaphat waxed great and had much business in the cities of Judah. There certainly ought to be some-

body, and by some means *officially*, teaching in the cities of this nation upon the subject of morality.

Reading thanksgiving proclamations by our presidents and governors we are almost startled by the devout spirit manifested, and if it were not for our observations would expect to see every place of divine worship filled by the people on the day set apart for that purpose.

The rush of college students and public school boys, with an occasional college president and professors, with an army of young and middle-aged men on such occasions to witness football games and other sports, and the meager attendance on divine worship are enough to start the inquiry whether this custom has not become a mockery and would better be abandoned.

I venture to suggest that even the sermons on the occasions seem to be vieing with the proclamations in high-sounding, far-away piety and not quite enough of common morality for strengthening the citizen in the duties of everyday life.

We have up to this point been considering the substance of things, what has been

accomplished, methods tested, and the principles at work.

Mythology says that Hercules was destined by the gods to complete twelve great undertakings before his work was ended.

Shall we stop here in the consideration of the work and destiny of the twin giants, moral law and civil law?

To advance is not an easy undertaking.

Morality fights no sham battles nor assails an unarmed foe.

We must take our places in the ranks and perform our duty or stand aside while the column goes by.

We can hear the marching columns sing:

"We have battles to fight;
We have foes to subdue;
Time waits for no man,
And we wait not for you.

"The mower mows on,
Though the adder may writhe,
And the copperhead coil
'Round the blade of the scythe."

We have called attention specifically to some things that have been tolerated and some that have been approved and authorized by law, but have at last been forbidden and suppressed because of their immorality.

As a matter of legal principle to which there is not an exception in its application, whatever is immoral or tends to immorality must be suppressed and cannot exist by permission. The great undertakings that civil government is destined yet to complete no man has presumed to number. That they are many no man will question.

That these are to be worked out by citizens through the application of legal principles and methods must be clear to us all.

I shall content myself with the consideration of what I think will be the next herculean undertaking of civil government in the States and by our general government.

CHAPTER X.

NO PRIVILEGES FOR EVIL.

FROM considerations presented in former chapters in this work I feel safe in saying that whenever the question is settled that any business or any conduct is immoral, that settles another question that follows as an inevitable conclusion, that business or conduct at once becomes an outlaw and cannot be given any legal status by any power known to civilized government.

It has taken a long time in many cases to settle the question of immorality.

As has been shown in many cases cited herein, enterprises, institutions, and conduct long accepted and looked upon as not matters of public concern, are sometimes suddenly seen to be improper and lawless and dangerous to the public welfare. In many cases long discussion, growth of intelligence, and sometimes bloody strife have been required to bring out full comprehension of the real character of great evils. Some of

the greatest evils *have not* always and under all conditions *been evils* or immoral.

Human slavery had its favorable conditions.

Daniel was a captive slave in Babylon, and Joseph was sold for twenty pieces of silver, but each reached a position that would gratify the most ambitious, and for which a man could afford to become a slave. Eleazer was Abraham's slave, but no greater advantage could have fallen to the lot of Eleazer, and was greatly to Abraham's advantage.

In unnumbered cases men and women, brought by force from their savage and beastly condition in Africa to the United States, became the property and were brought under the influence of humane masters and religious teachings, which has been, and will be to them and to their children an untold blessing in all time to come.

Many have been the cases where the slave in old age, disability, or sickness was free from care and his wants met by a kind-hearted master.

Many things could be truthfully said in favor of African slavery.

We can easily call up the scene of life before the civil war in this nation, when, as they were called, the old colored aunties and uncles clung to their master and mistress and to their children with a childlike and simple affection that was most beautiful.

I have in mind actual cases where these old uncles and aunties loved their master and mistress, and cared for and loved their little and grown masters and mistresses in the family, with that devotion we all long for, but seldom see, in the homes in these days between employer and employees. That tender relation between Uncle Tom and Little Eva, truthfully pictured by Mrs Stowe, has made many a little girl who has contemplated it wish she had such a faithful friend as Uncle Tom.

I say that slavery had many things that could be said with great force in its favor. So strong were these favorable arguments for slavery that it took two hundred and fifty years and an awful experience to overcome them. That other side of slavery given in *Uncle Tom's Cabin* was always true in the United States.

Slavery was always wrong in principle,

and its general influence and results were always bad.

Thomas Jefferson, when he contemplated the nature of the institution of slavery more than fifty years before the civil war, uttered the honest sentiment of his heart when speaking of slavery. He said, "I tremble for my country when I reflect that God is just and that his justice will not slumber forever."

Well might Jefferson tremble under such contemplation when he saw that institution recognized and to be continued by public acquiescence.

Jefferson's fears were well founded. A just God did amid the thunder and lightning of war destroy the wicked institution.

Slavery, from that fatal day in the year 1620, was always legally wrong and immoral as an institution, and by permitting it to exist anywhere in the United States the people invited the storm that swept it away at such awful cost. Every year that it continued made the cost of its removal the greater.

There were many things that could be said for the lottery business. It was often used as a method for raising money for

good purposes—in erecting public buildings and educational enterprises, and for many other purposes that were laudable. In such cases some consideration was given for every investment and ticket sold.

It took centuries to fully expose the wrong principle and immorality in this business. When that was accomplished the lottery business became *per se* unlawful, and cannot be authorized under any conditions.

The United States government is founded upon the right to religious liberty.

Men may teach, and organize to teach, if they desire, that there is no God, or they may adopt any form of worship and teach anything as to the character of the divine Being they like, or promulgate any religious creed, so long as they keep within the bounds of public morality. But they cannot transcend that boundary.

The Mormon Church taught and practiced plurality of wives. For that immorality in religious belief the government by force broke up their religion, made it unlawful, and confiscated the great estate of Brigham Young. Many good things could be said for the Mormon Church, but in so far as it

encouraged or promoted immorality it was an outlaw, as in any other case.

It might be said that if two or more persons for mere pastime and amusement, who can afford to, without inconvenience, see fit to put up a small wager on a quiet game, it concerns no one but themselves.

But gambling is on a wrong and dangerous principle and is immoral, and for that reason all public and private gambling, even in the quietude of a private home, is rigidly forbidden. It has been fully shown that the experiment often tried of licensing and regulating lotteries, gambling, and other immoral lines of business was wrong in principle and resulted in enlarging the magnitude and evils of such business; and for these reasons this theory of dealing with these evils has been abandoned and the settled and universal policy adopted of forbidding the existence of these enterprises.

I have called attention to the fact that the theory of chartering, incorporating, and licensing proper and useful enterprises has wonderfully developed and is growing in favor rapidly.

The words chartered, incorporated, or licensed mean substantially the same thing.

While this theory has worked satisfactorily and grown in favor when applied to useful and moral enterprises, it has correspondingly worked unsatisfactorily and disastrously whenever applied to any immoral enterprises. There is not an exception to this rule to be found in history, covering three thousand years, in the practical working of every system which gave such theory recognition and consent, whatever might have been the regulations and restrictions to immorality. This theory has been long and thoroughly tested and abandoned. Let us not be extravagant or reckless in statements, but let us be just as careful not to be timid, for I am now dealing with an extremely important matter.

I call attention to the many cases cited heretofore in this work, and especially to the cases wherein chartered rights without, and sometimes for large compensation to the States have been granted by legislative acts for lottery enterprises, and which acts have been held to be void. We boast, and well we may, of our rapid growth in intelligence, moral sense, and comprehension of legal principles. Every person who claims

to have been benefited by this advanced condition of affairs must be prepared to look at any matter of public concern calmly and thoroughly.

I now call attention to the saloon business, the institution, the enterprise, the place of resort where persons are invited, induced, and enticed to assemble and buy and drink intoxicating liquors and participate in the association of such a place.

It is not my intention to enter into a temperance lecture, or to say anything on the subject of temperance, or to discuss the question of the manufacture and sale of intoxicating liquors, or whether everyone must totally abstain or may use intoxicating liquors. I shall confine myself to the consideration of the legal status of the saloon, this place of resort, this business.

What kind of a business is this? Is it a moral or immoral business *per se?* Upon the settlement of these questions will depend the judicial action and the theory of legislation that shall be applied. Are the tendencies, effects, and results of this business like or substantially the same as in any other business which courts have recognized as moral?

I have heard it said that in Germany men go with their families and sit down at tables and drink beer for social enjoyment without bad moral results.

If any person will stop and think about such a statement, of what the influence and tendency of such a place must be under this, the very best claim that can be made for it, he will turn from such a claim of innocence with disgust. At any rate that kind of family life in the United States will not produce good results.

I need only call attention to the well-known fact that the German government is aroused to great activity upon this subject of the saloon influence, and in the last five years official statements of most alarming character have been published by its authority.

It is a hard thing to say of any community that the parents and children together resort to saloons and drink beer or any other intoxicating liquors. Such a statement carries an impression of the moral and intellectual condition of that community decidedly unfavorable to the mind of every citizen of average standing. Take a saloon under the most favorable conditions

claimed for it and think about it. The mind can reach but one conclusion as to its influence.

I say its influence and effects are not like the influence and effects of any business that we know of that is a moral business. There is an influence and effect in the saloon business worse and more dangerous than any influence or effect in or about any moral business.

I concede that there are often immoral influences connected with a useful and moral business; but the prevailing tendency and influence in any useful business tend toward morality. Sometimes a useful business is conducted in a dishonest way and upon dishonest motives; then the whole business is dishonest and immoral, for which the proprietor may be punished and his business broken up.

I have in mind men who engaged in business as real estate brokers, which is a legitimate and moral vocation, but they conducted it in a fraudulent and illegal way, on account of which they are now paying the penalty in the State prison, and their business is broken up and their ill-gotten gains restored to their victim. Such transactions cast no

taint of illegality or odium upon the legitimate business of real estate brokerage. I have known gamblers voluntarily to restore ill-gotten gains and perform deeds of charity and kindness; but that does not make gambling the less unlawful.

In the saloon business a sale and purchase of intoxicating liquors may be made that would not be immoral on either side; more than that, a sale and purchase of intoxicating liquors may be made in a saloon where the transaction would be highly proper on both sides—in case of an emergency.

But no man undertakes the saloon business for the purpose of selling to persons only, who would not in any way be injured, or who would be better for buying it.

I ask any candid man to contemplate the business of the best possibly conducted saloon for one busy hour and answer to his own judgment what is the prevailing tendency of that business in that saloon?

But the question is not to be determined by contemplating the best nor the worst conducted saloon. It is the general tendency of the saloon business that must be taken.

There were masters who treated their slaves kindly and made for the slaves better

conditions than they have made for themselves since they were free.

The great question of the right or wrong of slavery was not determined by taking the best and worst conditions. The general character, tendency, and effect of slavery was bad, and therefore slavery had to be abolished.

The settled rule of law is, that if the general character, tendency, and effect of any business is against the public morals, it cannot have a legal standing. I have said that the general character, tendency, and effect of the saloon business are not like the general character, tendency, and effects of any business which the law has ever recognized as useful and moral.

I now call attention to the fact that the general character, tendency, and effect of the saloon business are like the general character, tendency, and effect of every business that the law has recognized as immoral and illegal.

If the slavery system and the saloon system in the United States are laid down side by side and measured, put into the scales and weighed, analyzed, the good and bad elements separated and noted, their

respective effects upon the living and their posterity, every component element in each set down, and the real character, tendency, and effect carefully considered, the institution of human slavery will have the advantage in the result. Our government arose in its might and destroyed the institution of slavery because it incited rebellion.

The first rebellion against our government was the whisky rebellion of 1794, when the United States government was only five years old, and the business has been in rebellion more or less openly ever since against every government wherever it exists.

Make a like test of the saloon business, as made with it and slavery, with the lottery business, and the latter will come out of such a test with an appearance of respectability as contrasted with the former. The people of most States put a provision in their Constitution forbidding lotteries, courts have recorded against them their condemnation, the President of the United States government and Congress took speedy action to prevent their dire consequences, and they have been driven beyond the border of our nation.

Make a like comparative test of the saloon

business with prize fighting, and the result will be decidedly in favor of the latter in respectability and public safety.

The *Indianapolis Journal*, speaking of the evil of the saloon, said, "The open saloon is the universal public enemy."

The saloon business is alike in quality to every other adjudicated and well-known immoral enterprise, only the saloon business has the greatest proportion in its composition of immorality and danger. It is an axiom in geometry, that "things which are equal to the same thing are equal to each other."

I quote what the United States Supreme Court says in the case of Phalen *vs.* Virginia, 8 How., 163, 168, on the lottery business, as follows: "Experience has shown that the common forms of gambling are comparatively innocuous when placed in contrast with the widespread pestilence of lotteries. The former are confined to a few persons and places, but the latter infests the whole community; it enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor; and it plunders the ignorant and the simple."

Here I quote what the same court said in

the case of Thurlow *vs.* Commonwealth of Massachusetts, etc., 5 How., 504, decided in 1847, as follows: "It is not necessary for the sake of justifying the State legislation now under consideration to array the appalling statistics of misery, pauperism, and crime which have their origin in the use and abuse of ardent spirits."

Again, the same court, in the case of Crowly *vs.* Christensen, 137 U. S., 86, decided in 1891 upon the saloon business as follows: "By the general concurrence of opinion of every civilized and Christian community there are few sources of crime and misery to society equal to the dram-shop, where intoxicating liquors in small quantities to be drunk at the time are sold indiscriminately to all parties applying. The statistics of every State show a greater amount of crime and misery attributable to the use of ardent spirits obtained in these retail liquor saloons than to any other source."

Courts and Legislatures have declared specifically, and the whole people acquiesce, that the lottery business is an immoral business, and therefore unlawful *per se*, and cannot be made lawful by any power or action. And

the character, tendency, and effect of the lottery business are given so that we know how to identify an immoral and unlawful business by legal tests.

Now I call attention to the declaration of the highest judicial tribunal in the land as it states the result of its judicial conclusions concerning the saloon business in the language just quoted.

I repeat the last sentence of the last quotation with my own emphasis for the purpose of letting it burn its way to the core of the question under consideration: "The statistics of *every State* show a *greater* amount of *crime and misery attributable to the use of ardent spirits obtained in these retail liquor saloons than to any other source.*"

This being settled, that any business that produces or tends to produce misery or crime is immoral and unlawful, it follows that the business that produces the most misery and crime is the most immoral and the most unlawful. Therefore, as "the statistics of every State show a greater amount of crime and misery attributable to the use of ardent spirits obtained in these retail liquor saloons than to any other source," the saloon business is the *most im-*

moral and most unlawful business known to society.

As I have said, some good things could be said for slavery, for the lottery business. and even for prize fighting. It might be said that the latter encourages physical development by showing what can be accomplished in that way and how it can be done.

Not one good thing, however, can be said for the saloon business. It is debasing to the proprietor and his family, a stain upon the reputation of his children; its influence is dangerous to the best person who patronizes it, causes untold agony to the weak victims and their families, and is a upas tree in the community.

The only difference in saloons is in degree, not in quality. What can be done to meet this emergency, to relieve society from the ravages of this crime and misery-producing business?

> "For every evil under the sun
> There is a remedy, or there is none.
> If there is one, try to find it;
> If there is none, never mind it."

I do not want to be misunderstood. I am not considering the question of total abstinence, nor the prudent use of intoxicating

liquors, nor the question of hard or soft liquors. The only question I am considering is the saloon, the place of resort, the public institution, where inducements and invitations are held out for persons to go and buy and drink intoxicating liquors. It is this place, this institution, I am talking about.

The business is inherently immoral. If the court had not settled this question, every intelligent man could settle it from his own knowledge. An honest man will be candid and considerate with any important question.

The United States Supreme Court says, "This is the greatest source of misery and crime." Then it is the greatest matter of public concern.

Lottery, gambling, prize fighting, prostitution, and all other immoral business enterprises of like character cannot be licensed by law, because of their immorality. For the same reason any law that undertakes to license saloons is void on legal principles well settled, and must be so declared by the courts.

We have reached such a state of mental and moral development of public sentiment

and corresponding development in comprehension of legal principles that this business, this institution, this system, if never before, has become unlawful and a menace to public welfare.

License systems for lotteries and license systems for gambling have been declared void by the courts.

Slavery in England was destroyed by decision of the King's Bench. Slavery in the United States was abolished by the proclamation of the chief executive.

Courts can and must perform the duty imposed upon them when the question comes before them, as it will do, and declare any law which undertakes to provide a license system for saloons void.

As this business is the same in character as lotteries, gambling, prize fighting, and the hundreds of other offenses, it must be put under the same condemnation of law.

Lord Chancellor Cottingham of England a few years ago, in the case of Taylor *vs.* Salman, 4 Mylne & C., 141, declared the law of England as follows: "That it is the duty of courts of equity, and the same is true of all courts and of all institutions, to adapt its

practice and course of proceedings, as far as possible, to the existing state of society, and to apply its jurisdiction to all these new cases which, from the progress daily making in the affairs of men, must continually arise, and not, from too strict an adherence to forms and rules established under very different circumstances, decline to administer justice and to enforce rights for which there is no other remedy."

Judge Redfield, in his work on railroads, Vol. II, page 366, quotes this language of Chancellor Cottingham, and says that the rule therein announced by him "is certainly worthy of one of the ablest, wisest, and best judges that ever administered the chancery law of England or America."

The Supreme Court of Indiana, in the case of the Columbia Athletic Club *vs.* The State, 40 N.E., 914, a decision rendered so recently that it has not yet been reported, quotes and approves the declaration of Lord Cottingham and Judge Redfield's comments thereon.

After which our court uses the following language: "The Constitution puts its special bans upon lotteries, duels, and all infamous crimes; while at the same time

it provides for the moral and intellectual improvement of the people. A statute which should attempt to authorize prize fighting would most certainly be opposed to the spirit of the Constitution, and indeed that of the law itself, long since defined to be 'a rule of civil conduct prescribed by the supreme power of a State, commanding what is right and prohibiting what is wrong.' It is a well-settled rule of law that when the reason for a law ceases the law itself ceases."

But it is claimed by some defenders of the saloon system that if it were not for that system anyone and everyone could conduct the saloon business without restrictions.

Upon this very point when the question was in issue the Supreme Court of the United States, in the case of Crowly *vs.* Christensen 137 U. S., 86, said: "There is no inherent right in a citizen to thus sell intoxicating liquors by retail. It is not the privilege of a citizen of the State or of the United States."

I quote from Wood's *Law of Nuisance*, sec. 24: "The experience of all mankind condemns all occupations that tamper

with the public morals, tend to idleness, and promotive of evil manners, and anything that produces such results finds no encouragement from the law, but is universally regarded and condemned by it as a public nuisance. If it comes within the rules that have been established by the courts, and such have been dictated by the highest wisdom and soundest public policy, and is productive of all the ill results that characterize these wrongs, it is a public nuisance, and will be punished as such."

If the authority and protection given by the license law were withdrawn from the saloons in Indiana not one of them could stand against an arraignment as a nuisance. I could cite legal authority in this line sufficient to make a large volume, but deem this ample support to the two propositions which I link together: (1) That no man has an inherent right, if there were no law upon the subject, to sell intoxicating liquors by retail; in other words, to keep a saloon. (2) That the saloon business comes clearly under the definition of a nuisance if it were not protected by the license law.

The act of the Indiana Legislature, pro-

viding that a license may be granted for saloons in consideration of the license fee, is clearly "bargaining away the public morals and public peace," which courts have thoroughly settled cannot be lawfully done.

In every instance where courts have used this language—which have been no less than four times by the Supreme Court of the United States, and by many State Supreme Courts, among which is our own court—it has been used with reference to license systems, where a license is granted for a fee.

I am told that the document issued to the saloon keeper is not a grant or privilege, but is only a regulation and restriction. The document is called license; it calls itself a license; it says that the grantee "is hereby licensed." It is a license; it is a grant of privilege. Much protection to the public is claimed on account of the regulations and restrictions in the saloon license system.

REGULATIONS AND RESTRICTIONS.

There are regulations and restrictions in the preachers' license system adopted by Churches. Every man cannot get such a license.

There are regulations and restrictions in the teachers' license system. Many persons cannot get a license to teach.

There are regulations and restrictions in the marriage license law. Idiots and persons within a certain degree of kinship cannot marry, and there are other serious restrictions in the system.

I call your attention and ask your careful consideration to the purpose of these regulations and restrictions in any license system. They are for the benefit of the system, for its protection and preservation.

A license system without regulations and restrictions would amount to nothing. The stronger the regulations and restrictions the better for the protection of the system. It would be wholly inconsistent to establish a license system and then break it down with regulations and restrictions. Whenever restrictions go to the extent of destroying the business license, then they are not restrictions, but prohibitions, and are void if the license system is valid.

THE PURPOSE OF LICENSE.

The purpose of any license system is to protect and promote the enterprise licensed.

Whenever the State desires to take under its special care and protection, and thereby promote, any business or enterprise, the best system ever devised or adopted to accomplish the end is the license system. It is a well-known fact that the doctors of Indiana, after long years of discussion and careful consideration, caused a bill to be carefully prepared, establishing a license system for their business, and by an organized effort secured an enactment of the bill by the Legislature of Indiana. And they stand by it with great energy. It is also a well-known fact that the saloon keepers and liquor dealers of Indiana caused to be prepared the present saloon license law, and made a consolidated and vigorous effort whereby they secured its enactment by the Legislature of Indiana; and they stand by their system with an energy that amounts to desperation.

To establish in your minds the fact that the principles upon which the saloon license and doctors' license law, as illustrative of all license laws, are the same, I quote from the first sections of each of the two systems named.

SALOON LICENSE LAW.

"Be it enacted by the General Assembly of the State of Indiana that it shall be unlawful for a person, directly or indirectly, to sell, barter, or give away for any purpose of gain, any spirituous, vinous, or malt liquors in less quantities than a quart at a time, without first procuring from the Board of Commissioners of the county in which said liquor is to be sold a license as hereinafter provided."

DOCTORS' LICENSE LAW.

"Be it enacted by the General Assembly of the State of Indiana that it shall be unlawful for any person to practice medicine, surgery, . . . in this State without first obtaining a license to do so as hereinafter provided."

Upon any analysis of the purpose, principle, system, or results, the saloon license is based upon the same theory and is treated exactly the same in all respects as any and every other licensed enterprise. The enthusiast for any of the systems named, or any other licensed system, may make the showing for his favorite as strong as he can in the light of facts, and when he has fin-

ished and shown the promotion and protection given by the law to the enterprise licensed, then the liquor dealer can show that there has been none of these systems that has done more for which to be praised by its beneficiary for prosperity and promotion than has the saloon license system. Whatever people may have heretofore believed, whatever they may believe now, the rugged fact looks them in the face, nevertheless, that every license system is intended for the purpose of promoting and protecting the business licensed, and does result in promoting and protecting the business; and no business has been more highly favored in this regard than the liquor traffic, and no business under a license system has grown and prospered in wealth and influence more than this deadly business.

It will not do to say that we license the saloons for the purpose of discouraging and breaking up the saloon business, nor that we license the sale of intoxicating liquors to be drunk in saloons to discourage and diminish the drinking of intoxicating liquors.

The Church believes in the promotion of

the Gospel and in preaching. Therefore it licenses ministers.

The State believes in education and the business of teaching. Therefore it licenses school-teachers.

The State believes in marriage. Therefore it licenses marriage.

The State believes in the business of practicing medicine and surgery. Therefore it licenses doctors.

Whatever people may heretofore have thought, and whatever they may now think, they are held to the result of what they do, when the result is well known to them, as the true interpretation of their intention.

When the State of Indiana licenses the saloon business it must be held by that act to believe in the saloon business.

When I speak of the Church I mean the people in the Church.

The man who votes in the Church in favor of licensing ministers does so because he believes in the ministry.

When I speak of the State I refer to the people composing the State.

While the people of the State maintain a saloon license system they cannot say that *they do not believe in the saloon business.*

NOT UNDER THE BAN OF THE LAW.

I am told that the regulations and restrictions in the saloon license system put the saloon business under the ban of the law and in disgrace.

But do the regulations and restrictions of the preachers' license system put the business of preaching the Gospel under the ban of the Church and in disgrace?

Do the regulations and restrictions of the teachers' license system put that system under the ban of the law and in disgrace?

Do the regulations and restrictions of the marriage license put that institution under the ban of the law and in disgrace?

The regulations and restrictions in each of these systems is upon the same principle, has exactly the same effect, treats the business in the same light.

The regulations and restrictions in the saloon license system no more puts that business under the ban of the law and in disgrace than is marriage brought under disgrace by the license, regulations, and restrictions concerning it.

The regulations and restrictions in the saloon license system are the guardian angels that hover about the system for the

same purpose that they guard any other system.

There might be schools, school-teachers, doctors, preachers, and marriage, and all these did exist before the license system; but there could be no saloons without a license.

Without this document the man who established a saloon would be subject to punishment for every drink he sold. With this document he is guaranteed the protection of the State in his business. Thus, the office of this document is to protect and enable him to conduct the saloon business. A saloon without a license system and a license for its protection would be an unlawful institution, because of the character of the business itself. No man has the right to conduct the saloon business without the authority which such a license confers upon him.

Let it be borne in mind that I am not lecturing on temperance, nor trying to be sentimental, but I am attempting to apply legal principles as old as the hills and common sense rules to a case in hand.

No question will be raised by any lawyer upon the proposition that the Legislature

of the State may provide by law for license, with regulations and restrictions for any business that is in the interest of the public.

I affirm with the utmost confidence that no act of the Legislature that attempts to license or regulate and restrict any business that is immoral, or that tends to the promotion and encouragement of immorality, can be valid. The Supreme Court of the United States, the Supreme Court of Indiana, and the Supreme Courts of other States have, in legal effect and contemplation, held that the saloon business is an immoral business. If it is it cannot be legally licensed. The saloon business must be considered upon its character, tendencies, and effects as seen and comprehended to-day, not as they were seen and comprehended one hundred, or even twenty-five, years ago.

Let me make myself clearly understood upon this question. I concede that many times the higher courts have decided that Legislatures have the power to license the sale of intoxicating liquors, and I fully concede that the Legislatures have such power for proper purposes and under proper restrictions and regulations. The Supreme Court

of the United States defines this legislative power in the following language: "As it is a business attended with danger to the community it may be entirely prohibited or be permitted under such conditions as will limit to the utmost its evils." This language of the highest court lays down the principle of law involved in this question.

My application of the principle to the case in hand is that, as the saloon business does not limit nor lessen, but encourages and augments the evils which arise from the sale of liquors; as the history of one hundred years thoroughly establishes that the saloon business, with its places of resort, is the worst and most dangerous system for the sale of liquors that could possibly be provided; as the saloon business is not necessarily connected with the sale of liquor, as the sale of intoxicating liquors might be provided for, for all necessary purposes, without connection with the saloon business, or any place of resort, for the convenience and purpose of drinking the same, therefore the Legislature does not have the power to license the saloon, the dangerous and evil resort.

This I claim to be the correct position,

even if the question of morality were not involved in the case and it stood upon the questions of public health and public safety.

A territorial government was established for the Northwestern Territory in 1787. That Territory covered the region north of the Ohio River, east of the Mississippi River, and embraced what are now five States. The legislative branch of the government consisted of the governor and three judges. The very first act of the legislative body was a law providing a license system for saloons. That was more than one hundred years ago. I hold up before you that license act beside the present saloon license system enacted by the Indiana Legislature in 1875, prepared and enacted upon the demand and to the satisfaction of the liquor interests of Indiana, and call your attention to the fact that the difference between these two acts is of immaterial and of trifling importance. In many respects they are identical, word for word. For one hundred years, except about four years, a license system has ruled over the soil of what is now Indiana. One hundred years is long enough to test any system of legisla-

tion. The experience and observation of men for the last hundred years, the laws of inheritance, the disposition of property by will, the rights of married women, the rights and uses of property, have undergone great changes. A public system of education has been devised, business enterprises and inventive genius have stimulated thought into marvelous activity. The dense forests and wild prairies have been converted into fruitful fields, prosperous homes, and great cities. Conditions, social and political, have undergone great changes. The rights of State, of men and property, have been better defined. A whole race has been set free. Legislation and judicial decisions have done much to promote and protect fair dealing in business and the suppression of all phases of vice and fraud; a lottery system that was so highly regarded long after this saloon system was adopted that it was legally connected with education in the Vincennes University, and in the construction of churches, and even public buildings in the capital city of the nation, has long since been declared a crime, and suppressed in Indiana and in all other States. Old theories

and systems of legislation long ago fled before the marching columns of our advancing civilization. New theories have been tested, developed, and abandoned. But a license saloon system has survived them all, without material change, in this one hundred years of progress in all things else. The saloon license law of Indiana remains to-day substantially the same as the saloon license system for the Northwestern Territory, adopted more than one hundred years ago. After one hundred years of trial of this measure the highest judicial tribunal of this nation declares that:

"The statistics of every State show a greater amount of crime and misery attributable to the use of ardent spirits obtained in these retail liquor saloons than to any other source."

The moral and Christian sentiment of the whole world cries out against it. And yet this worst of all evils and institutions remains and retains its foothold. These saloons that were trifling in their influence and power a century ago have, under the fostering care of this vicious system, grown so great in wealth and power that they

defy the laws we have and the government under which they exist, and boldly announce that the laws cannot be enforced against them, and sneeringly defy the intelligent and civilized sentiment of the nation.

It seems to me that under the enlightenment and development of civilization and education the most surprising thing presented to our view is the continuance and prosperity of this greatest crime and misery producing system. That of all the theories and systems of legislation upon any subject the worst and most destructive should survive with us more than one hundred years is beyond comprehension. I arraign this system before the good citizens of this State and the whole nation, with its one hundred years of record and history, every page of which is stained with blood, and which is condemned from every source worthy of consideration, and charge it with every crime known to man, and deny that it has one redeeming trait. The only plea offered in its behalf is one of confession and avoidance, admitting that it is an evil, but claiming that it is a necessary evil. I demur to this plea, upon the ground that

there never was and never can be, founded upon any legal principle, an evil that is necessary. If an institution is evil both principle and the whole power of the law must be arrayed against it.

Some legal propositions are thoroughly settled by the harmonious decisions of the highest courts:

1. That morality, as contemplated in the Constitution and laws of Indiana, is the morality that is contemplated in the Christian religion.

2. That the Constitution of Indiana demands the Legislature to promote and protect morality.

3. That the saloon business is an immoral business.

Hence the inevitable conclusion is that licensing the saloon business is licensing immorality and is bargaining away the public morals and the public safety.

I admit that Supreme Courts of many States have held that this is a lawful business; but I stand unawed in the presence of these courts and declare that an immoral business cannot be a lawful business, however apparently solemn may be the act of the Legislature attempting to authorize the

same, and that the saloon business is more immoral and more unlawful than the lottery business. The Legislature may authorize, license, and protect what is right, and in the interest and in harmony with the public welfare, but it may not license an immoral or evil business. I am not attempting to avoid or shrink from decisions of our Supreme Court in Indiana, which have specifically declared that the saloon business is a lawful business and that the license system is valid. Let me recognize and admit these decisions fully, and all there is in them, as precedents upon this question.

The courts of England had held, and the public had acquiesced for more than fifty years, that slavery was a legal institution; but I have given you the facts and history of the case in which Lord Chief Justice Mansfield, more than one hundred years ago, speaking for the King's Bench and to the civilized world, utterly disregarding all precedents, uttered the Christian and civilized sentiments of the people, as these sentiments had grown to be, that such an inhuman and immoral institution could not be lawful.

I have called your attention to the decision

of the Supreme Court of Indiana in 1879, which declared hat a lottery system had become a part of the chartered and vested rights of the Vincennes University as a perpetual right, and based that decision upon numerous precedents; but the same high court, to its praise and honor let it be said, at a later day, looking again at the question with more light, overruled its own decision, disregarded all the precedents upon which it was based, and declared as the law of Indiana that the lottery business could not be given legal existence nor vested rights in our State, because of its immorality.

I have called your attention to the fact that, though slavery had been recognized by the Supreme Court of the United States, and acquiesced in by the people of the nation as a lawful institution for more than two hundred and fifty years, yet there came a day when it was necessary to destroy and abolish that institution, though it existed only as a domestic institution in individual States, in order to save the government; and that great end was accomplished by a proclamation that stands as the greatest act of any man in the whole history of the nation.

Whatever may be the precedents, however much prejudice, vast wealth, and political considerations may have been able to claim and accomplish, the demand of civilization, the demand of the public welfare, and demand of sound legal principles, from every source of public safety comes the ceaseless demand that immorality shall not be licensed nor promoted; "that the greatest source of misery and crime" shall not be protected, but must be destroyed.

The Supreme Court of Indiana, in the case of Haggart *vs.* Stehlin, illustrated to the people its power and courage, its high integrity and regard for legal principles and sound morality, by a great advance in its declaration of the law as founded upon morality. Whatever that high court may have held at different times in years gone by, there is a day coming, and I believe near at hand, when it will strike a blow, as did the King's Bench in England at slavery, and as our own Supreme Court did at the lottery business, and destroy the license saloon system of our State, as will other courts of other States.

Indiana boasts of her institutions of learning, churches, patriotic devotion, and the

prowess of her sons on the field of battle. She takes just pride in her record for loyalty. Let me call attention to the fact that loyalty to the State, to the Union and government, requires that morality shall be maintained with the same zeal that maintained our cause against George III and against disunion.

There is no disloyalty equal to the participation in, or consent on the part of the people that any system of immorality shall have a camping ground upon our soil. It is disloyalty and treachery to the government to support any man for official position who is dominated by saloon influence.

We have in Indiana many institutions established and maintained at public expense, such as Deaf and Dumb Asylum, Blind Asylum, Insane Hospital, State University, Normal School, Reform School for Boys, and a School for the Feeble-minded.

There is one other institution for which there is a crying need, and that is a School for the Feeble-hearted.

A State and national organization has been perfected for the special purpose of maintaining and protecting the saloon business. This institution is now flourishing in

Indiana. It announces its purpose, among other things, to control legislation. The meetings of this organization are not opened and closed with prayer. It does not depend on prayer. It defies God and man. It has tremendous success and power to overawe and intimidate ambitious politicians, legislators, and many officers whose duty it is to enforce the law. Its success lies in the fact that it is courageous, desperately in earnest, and uses its money and influence without stint. Whenever the opponents of this business become as courageous and consistent as the men who are engaged in this business, then the victory for sound principles, law, and justice will be won.

Much is made, and must be, of the office of love in accomplishing the reformation of individuals. But love is misapplied if exercised on behalf of immorality or lawlessness. These things are not to be loved, but are to be hated. Love is for humanity, to be exercised in its behalf and against all evil influences and institutions. Abraham Lincoln loved the government of the United States when he put two millions of men in the field, clothed in military uniform, armed and supplied with munitions and deadly weapons,

to put down a rebellion by bloody war. General Grant loved his government and the flag when he stretched his long lines of blue in the wilderness, and fought it out on that line with shot and shell and minie ball, with fixed bayonets and flashing sword, until he established the supremacy of law.

It is both just to the Union soldiers and magnanimous to the foes they opposed to say that the late civil war would have been short-lived if it had not been that General Robert E. Lee and the armies he commanded loved a cause which moved men to stand in the jaws of death undaunted.

If a man loves the right he hates the wrong. If a man loves God he hates Satan, and loves God in just the same degree that he hates Satan.

If we love the families of the drunkard and the drunkard himself, and seek their welfare, we hate the saloon institution as we hate Satan. We make much of the unbounded love of Christ, and this cannot be overdone. The great purpose of his life and ministry was to teach this love; but we fail to comprehend the whole character of the good Master if we study only one side of it.

He went one day into the temple and saw there those who sold oxen and sheep and doves, and the money changers. These people had been licensed by the high priest for a large license fee to conduct these enterprises in the temple. When He who loves as no man ever can love saw this pollution of the temple and the wickedness of that license system, with fire in his eye and thongs in his hand he drove those people out of the temple. I imagine I can see the panic that reigned in that sacred inclosure as the gates flew open and the animals and men rushed pell-mell into the streets to escape pursuit and wrath.

It is high time that Christian civilization, as it contemplates the wickedness, devastation, and ruin produced by a licensed saloon system, should rise in righteous indignation, and with fire in its eye drive this business and the system out of our State. And the same duty and the same demand rest upon the citizens of every State in the Union. There are other very important matters of public interest which deeply concern good morals. These require and must have our attention; but the saloons and liquor business have combined, and stand alone as

organized evils and immoral influences. This combination appears publicly in the field, waving its banner, with its lines formed, has issued its declaration of war and announced its purpose to maintain, at all hazards, the most demoralizing of all evil influences and the present system of public consent and lawlessness. This organization exhibits its muster roll, shows its force, calls attention to its bank account. This organization must be encountered and overcome by manly and patriotic effort. I am not urging nor expecting that all these great undertakings shall be accomplished in one day, or that any one of them can be disposed of at once; but the demand and duty upon us are that every day shall record an honest day's work toward the accomplishment of the ends sought. There must be steps taken, and there can be only one step taken at a time, but every step should be an advance. Earnest, candid men have no time for equivocation, evasion, or subterfuge.

The Jordan takes its rise from the melting snows of Mount Hermon, is augmented by the pure streams and rivulets that empty into it. It flows through what was once the

richest land and the most beautiful valley in the whole world. Its waters are clear as crystal, delicious and refreshing to the taste; but it empties into the Dead Sea, in the waters of which there is no living thing, and on the shores of which nothing can grow save the apples of Sodom. So the temperance movement takes its rise from the melting sympathy of human hearts; on its course receives and is augmented by the prayers, energy, and contributions that flow into it through every valley and from every pure fountain. But we have allowed the enemy to dig the channel and divert the course until this pure, clear, refreshing, life-giving stream has been emptying into the Dead Sea of political corruption, which is filled with dead men's bones and colored with human blood. The flow cannot and must not be stopped; but the natural channel must be opened, so this stream shall empty into the great ocean of God's love.

I looked on the cyclorama of Gettysburg —the greatest picture of a real battle that was ever painted. That is the picture of war with all its horrors. After having been enrapt and held to the most intense contemplation of that bloody scene, I turned

away and said to myself, Can it be possible that a people speaking the same language, citizens of the same government, bound by the ties of consanguinity, revering the same history and ancestry, can be brought into such a struggle as this? That battle ought never to have been fought, and never would have been fought if the citizens of this republic had performed their patriotic duty in time of peace, and had not suffered themselves to be misled by mere partisans into delusions and efforts to maintain an immoral and inhuman institution.

Shall we be swayed by prejudice, controlled by designing men, cower before the lawless, betray the government we claim to love, and leave to another generation to settle, by the flow of blood and awful anguish, questions which we ought to settle, or shall we learn lessons from the past and avoid disaster?

There can be no safety for any people or government outside of sound legal principles. There can be no sound legal principles unless founded upon morality. These facts must not be confused, obscured, nor lost sight of.

THE END.